Supreme Court, U.S.
FILED
JAN 5 - 2009
OFFICE OF THE CLERK

No. 08-84

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND A. KIGHT, et al.,
Petitioners,

v.

SHERRI A. TURNER,
Respondent.

On Petition For A Writ Of Certiorari to the Court Of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a federal district court dismisses state law claims under 28 U.S.C. § 1367(c), does 28 U.S.C. § 1367(d) operate to toll the limitations period to the extent necessary to guarantee the plaintiff a period of at least 30 days following the dismissal to refile in state court (as most state courts and all federal courts of appeals that have considered the question have concluded), rather than to suspend the running of the relevant state statute of limitations and thereby grant the plaintiff a refiling period consisting of the entire balance of the limitations period plus 30 days (as the Court of Appeals of Maryland, among a minority of other state courts, has decided)?

2. Once a federal district court has dismissed state law claims under 28 U.S.C. § 1367(c), have they ceased to be "pending" for purposes of 28 U.S.C. § 1367(d)?

PARTIES TO THE PROCEEDING

The plaintiff in the proceedings below, and the Respondent before this Court, is Sherri A. Turner. The defendants below were eight law enforcement officers of the State of Maryland (the "State Parties") and three officers of Montgomery County, Maryland, as well as the County itself (the "County Parties"). The State Parties are Sheriff Raymond A. Kight, Lt. Col. Bruce Sherman, and Deputy Sheriffs Rodney Brown, Robin Lewis, Richard Kane, William Pechnick, Eric Brown, and Brian Philips. The County Parties are Arthur M. Wallenstein, Theresa L. Hicks, Robert Andrews, and Montgomery County, Maryland. The State Parties and the County Parties are the Petitioners before this Court.

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The State Parties, Sheriff Raymond A. Kight, Lt. Col. Bruce Sherman, and Deputy Sheriffs Rodney Brown, Robin Lewis, Richard Kane, William Pechnick, Eric Brown, and Brian Philips, and the County Parties, Arthur M. Wallenstein, Theresa L. Hicks, Robert Andrews, and Montgomery County, Maryland, respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.[1]

[1] Under Maryland law, the Sheriff of each county is a State constitutional officer, Md. Const., Art. IV, § 44, and Deputy Sheriffs are also State personnel, Md. Code Ann., State Gov't § 12-101(a)(6).

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Turner v. Kight*, 406 Md. 167, 957 A.2d 984 (2008), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in the appendix to this petition at App. 1-31.

The reported opinion of the Court of Special Appeals of Maryland, *Turner v. Kight*, 178 Md. App. 1, 938 A.2d 863 (2007), affirming the decision of the Circuit Court for Montgomery County, Maryland, is reproduced in the appendix to this petition at App. 32-51.

The Circuit Court for Montgomery County, Maryland, issued an oral opinion dismissing Respondent's claims, and a transcript of the hearing and ruling is reproduced in the appendix to this petition at App. 52-72.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on October 7, 2008. This petition is filed within 90 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1367 provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in

any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

STATEMENT OF THE CASE

On May 15, 2001, Respondent filed in the United States District Court for the District of Maryland a 19-count complaint alleging mistreatment by Montgomery County, Maryland, three County officers, and eight law enforcement officers of the State of Maryland in April 2000. (App. 2.) Twelve counts asserted claims pursuant to 42 U.S.C. § 1983, and seven asserted causes of action under state law. (App. 2.) On March 26, 2002, the district court entered judgment in favor of all the defendants on all of Respondent's federal claims, and declined to exercise supplemental jurisdiction over her pendent state law claims. (App. 3); *see also Turner v. Kight*, 192 F. Supp. 2d 391 (D. Md. 2002). On April 5, 2002, Respondent moved for reconsideration concerning only the federal counts of her complaint. (App. 3.) On August 7, 2002, the

district court granted Respondent's motion for reconsideration as to one federal count, against one defendant County employee. (App. 3); *see also Turner v. Kight*, 217 F. Supp. 2d 680 (D. Md. 2002). On August 20, 2003, the court granted summary judgment in favor of that County employee. (App. 3.) Respondent filed a motion for reconsideration of that order, which the court denied on December 22, 2003. (App. 3.)

On January 15, 2004, Respondent noted an appeal. (App. 3.) On January 7, 2005, the United States Court of Appeals for the Fourth Circuit affirmed the federal district court by unpublished *per curiam* opinion. (App. 3); *see also Turner v. Kight*, 121 Fed. Appx. 9 (4th Cir. 2005). On March 8, 2005, the Fourth Circuit denied Respondent's petition for rehearing en banc. (App. 3-4.)

On March 11, 2005 – more than two years after the federal district court's dismissal of her state law claims, and more than a year after that court's denial of her final motion for reconsideration with respect to the last surviving federal claim – Respondent filed a new action in the Circuit Court for Montgomery County, Maryland, in which she reasserted the same state law claims. (App. 4.) She thus refiled her state law claims relating to the incidents of April 2000 almost two years after the three-year state limitations period for filing those claims had expired as a matter of state law.

On June 24, 2005, the state trial court heard argument on the Petitioners' dispositive motions, which requested dismissal of Respondent's lawsuit as

untimely. (App. 36-37, 52-72.) Specifically, Petitioners asserted that Respondent filed her state court action beyond both the three-year state statute of limitations, and the 30-day grace period that 28 U.S.C. § 1367 afforded her to refile her state claims in state court after their dismissal in federal district court. (App. 56-60.) Respondent, however, contended that, due to the operation of 28 U.S.C. § 1367, "[t]he limitations period was suspended from the period of time that the case was initially filed in Federal Court, that was May of 2001, until all Federal Court claims were dismissed [by the district court], and that was December of 2003." (App. 63.) In other words, Respondent argued, the running of the limitations clock "was suspended" during the period of time the case was in federal court, and "started ticking again in December of 2003," when the district court denied her second motion for reconsideration. (App. 63.) Therefore, Respondent contended, at that time she still "had more than two years left on [her] statute of limitations," plus the 30 days provided by 28 U.S.C. § 1367. (App. 64-65.)

The State trial court rejected Respondent's arguments. The court observed that Respondent's interpretation of 28 U.S.C. § 1367 would allow federal courts effectively to extend state limitations periods by many years, when 28 U.S.C. § 1367 affords only a 30-day tolling period to permit refiling in state court. (App. 67.) Accordingly, the trial court dismissed Respondent's action as untimely. (App. 70-71.)

Respondent appealed the trial court's ruling, which the Court of Special Appeals of Maryland affirmed. (App. 32-51.) That court agreed with the

trial court that 28 U.S.C. § 1367 "tolls the consequence, but not the progression, of a state statute of limitations." (App. 34.) Maryland's intermediate appellate court further concluded that "the 30-day period provided by § 1367 begins to run at the end of the federal district court proceedings," not (as Respondent argued for the first time on appeal) from the conclusion of any subsequent federal appellate proceedings. (App. 34.)

Respondent then petitioned for review by Maryland's appellate court of last resort, the Court of Appeals of Maryland, which reversed the State trial court and intermediate appellate court. (App. 1-31.) Disagreeing with the two lower State courts, the Court of Appeals of Maryland held that "§ 1367(d) does, indeed, suspend the running of limitations and does not merely extend the period," and that "the suspension remains in effect until 30 days after all Federal proceedings, including appellate proceedings, are concluded." (App. 7.) Accordingly, the Court of Appeals of Maryland held that the trial court had incorrectly dismissed Respondent's claim as barred by limitations.

REASONS FOR GRANTING THE WRIT

This case squarely presents a question of federal law on which the state courts are divided, and which often is of dispositive importance to litigants prosecuting or defending actions containing both state and federal claims. The issue concerns the proper interpretation and tolling effect of 28 U.S.C. § 1367(d), a statute enacted to "assure[e] that state-law claims asserted under § 1367(a) will not become time barred

while pending in federal court." *Jinks v. Richland County, S.C.*, 538 U.S. 456, 464 (2003). Specifically, the primary question presented is whether 28 U.S.C. § 1367(d) *extends* an otherwise expired limitations period for 30 days following the federal dismissal, or altogether *suspends* the running of the limitations period throughout the action's pendency in federal court. In addition to the well-developed split among state courts, state and federal courts have reached different conclusions as to which of those constructions of § 1367(d) is correct.

Clarification also is necessary as to when an action ceases to be "pending" for purposes of 28 U.S.C. § 1367(d), and particularly whether it remains "pending" during periods of discretionary federal appeal, including the pendency of petitions for rehearing en banc. This case presents that important subsidiary question as well.

Properly interpreted, § 1367(d) promotes fairness, efficiency, and comity, by allowing a claimant to reassert state law claims in state court if a federal district court dismisses them after the limitations period has expired, but limiting the refiling period to 30 days following that dismissal, unless state law provides a longer period. The incorrect reading of the Maryland Court of Appeals and some other state courts, by contrast, overrides the legitimate state policies embodied in state statutes of limitations, without serving any federal interest.

I. THERE IS DISAGREEMENT AMONG THE STATES, AND BETWEEN CERTAIN STATE AND FEDERAL COURTS, CONCERNING THE PROPER INTERPRETATION AND TOLLING EFFECT OF 28 U.S.C. § 1367(d).

28 U.S.C. § 1367(d) is an unusual federal procedural statute, in that it applies primarily in state courts, where it operates to determine the permissible time period for refiling state law claims after a federal court has dismissed them. In that circumstance, § 1367(d) provides that a federally dismissed state law claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." Because § 1367(d) determines the viability of refiled state law claims in the state courts, those courts have been the principal arbiters of the statute's meaning and tolling effect.

A conflict of authority has developed among the states applying 28 U.S.C. § 1367(d), in two respects. The first and more fundamental point of disagreement concerns the meaning and effect of the term "tolled." The second difference of opinion regarding § 1367(d) concerns the meaning of the phrase "while the claim is pending," which defines the period during which the limitations bar has no effect. This case provides the Court a suitable vehicle for resolving the widespread judicial disagreement on these two issues of federal law.

A. Courts Disagree About The Meaning Of "Tolled" In 28 U.S.C. § 1367(d).

Most state appellate courts that have decided the issue construe the term "tolled" to mean that, if the limitations period for a state law claim expires while the claim is pending in federal court, then the limitations period extends for a fixed period of only 30 days after dismissal of the state claims by the federal court. *See Weinrib v. Duncan*, 962 So.2d 167, 169 (Ala. 2007); *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257, 261, 262 (Cal. Ct. App. 1998); *Stevens v. ARCO Mgmt. of Wash. D.C., Inc.*, 751 A.2d 995, 997, 1003 (D.C. 2000); *Dahl v. Eckerd Family Youth Alternatives*, 843 S.2d 956, 958 (Fla. Ct. App. 2003); *Berke v. Buckley Broad. Corp.*, 821 A.2d 118, 123-24 (N.J. Super. Ct. App. Div.), *cert. denied*, 832 A.2d 322 (N.J. 2003); *Harter v. Vernon*, 532 S.E.2d 836, 839-40 (N.C. Ct. App.), *appeal dismissed and review denied*, 546 S.E.2d 97 (N.C. 2000), *cert. denied*, 532 U.S. 1022 (2001); *Juan v. Gov't of N. Mariana Islands*, 2001 WL 34883536 at *4 (N. Mariana Islands Nov. 19, 2001).

By contrast, other state appellate courts, now including the Court of Appeals of Maryland, interpret "tolled" as signifying an interruption and suspension of the running of the limitations period during the federal action, after which the limitations period resumes running, with § 1367(d) adding a further 30 days to that period. *See Bonifield v. County of Nevada*, 114 Cal. Rptr. 2d 207, 211 (Cal. Ct. App. 2002); *Turner v. Kight*, 406 Md. 167, 957 A.2d 984 (Oct. 7, 2008) (App. 1-31); *Oleski v. Dep't of Pub. Welfare*, 822 A.2d 120,

126 (Pa. Commw. Ct. 2003); *Goodman v. Best Buy, Inc.*, 755 N.W.2d 354, 359 (Minn. Ct. App. 2008).

To the extent that the federal courts of appeals have considered the tolling effect of 28 U.S.C. §1367(d), their interpretations are uniformly consistent with the majority view among the states. *See Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2nd Cir. 2008) ("[P]ursuant to 28 U.S.C. § 1367(d), the limitations period is tolled while [state law] claims are pending and for 30 days after they are dismissed."); *Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007) ("[S]ection 1367(d) explicitly tolls the statute of limitations for 30 days after dismissal of a supplemental claim, to allow the plaintiff to refile the claim in state court without being time-barred."); *Johnson v. City of Bullhead City, Az.*, 34 Fed. Appx. 557, 561 (9th Cir. 2002) (citing § 1367(d) as "tolling the state statute of limitations for thirty days after the dismissal of supplemental state law claims"); *Beck v. Prupis*, 162 F.3d 1090, 1099-1100 (11th Cir. 1998) ("[A] dismissal under section 1367 automatically tolls the statute of limitations on the dismissed claims for 30 days."); *Franklin v. Zain*, 152 F.3d 783, 786 (8th Cir. 1998) ("Pursuant to 28 U.S.C. § 1367(d), the period of limitations for [a] pendent state claim shall be tolled for the period while the claim was pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period."); *Ball v. Renner*, 54 F.3d 664, 669 n.8 (10th Cir. 1995) (noting "the 30-day tolling period that 28 U.S.C. § 1367(d) provides for dismissed supplemental claims"); *Edmondson & Gallagher v. Alban Towers Tenant Ass'n*, 48 F.3d 1260, 1267 (D.C. Cir. 1995) ("Section

1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal."); *see also Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 761 (6th Cir. 2000) (citing and following *Edmondson & Gallagher*); *Hedges v. Musco*, 204 F.3d 109, 123 (3rd Cir. 2000) (citing and following *Beck*); *Brown v. City of Boston*, 98 F.3d 1333 (1st Cir. Oct. 15, 1996) (unpublished *per curiam* decision) (citing and following *Edmondson & Gallagher*).

Litigants in at least four states are subject to apparently divergent state and federal court interpretations of the proper application of 28 U.S.C. § 1367(d). For instance, the United States District Court for the District of Maryland, contrary to the Court of Appeals of Maryland, interprets § 1367(d) to afford only a fixed, 30-day extension of the otherwise expired limitations period to permit refiling of otherwise extinguished state claims in state court. *See Burton v. Youth Servs. Int'l*, 176 F.R.D. 517, 522 (D. Md. 1997) ("Although the facts giving rise to [plaintiff's] state law claims occurred more than three years ago, the Maryland statute of limitations will not bar his recovery if he files suit in state court *within thirty days of this opinion*.") (emphasis added); *see also also Gruber v. Bendos*, 2005 WL 2065234 at *3 (D. Md. Aug. 23, 2005) ("Maryland allows a 30-day period . . . to file a complaint in the state court after a case is dismissed for lack of federal jurisdiction."). Similarly, in Minnesota, the holding of *Goodman*, 755 N.W.2d at 358-59, is inconsistent with the Eighth Circuit's construction of § 1367(d) as articulated in *Franklin*, 152 F.3d at 786. In Pennsylvania, the state court

decision in *Olcski*, 822 A.2d at 126, is contrary to the Third Circuit's interpretation of § 1367(d) as expressed in *Hedges*, 204 F.3d at 123. In California, the interpretation of § 1367(d) in *Bonifield*, 114 Cal. Rptr. 2d at 211, is contrary to the statute's interpretation both by a coequal California appellate court in *Kolani*, 75 Cal. Rptr. 2d at 261, and by the Ninth Circuit in *Johnson*, 34 Fed. Appx. at 561.

In all these states, the state and federal courts have different understandings about the time within which a state law claim dismissed in federal court must be refiled in state court. Such confusion – which can lead to the inadvertent loss of a state claim or the improper consideration of a claim that should be barred – should not be allowed to persist.

B. Courts Disagree About The Meaning Of "Pending" In 28 U.S.C. § 1367(d).

28 U.S.C. § 1367(d) provides that the limitations period is tolled "while the claim is pending and for a period of 30 days after it is dismissed," thereby indicating that a claim ceases to be "pending" for purposes of § 1367(d) once the federal district court dismisses it. That interpretation is consistent not only with the statute's plain language, but with learned commentary, *see Turner*, 178 Md. App. at 15, 938 A.2d at 872 (App. 50-51) (discussing "the commentary to § 1367(d) in the United States Code Annotated"), and with the decision of at least one federal court, *see Jarmuth v. Frinzi*, 2006 WL 4730263 at * 12 (N.D.W. Va. Mar. 7, 2007) ("[C]ommon sense counsels that it is the ruling of the trial court judge that effects the

dismissal of a claim" for purposes of § 1367(d)), *aff'd sub nom. Jarmuth v. Waters*, 220 Fed. Appx. 228 (4th Cir. 2007).

Nevertheless, several state courts, now including the Court of Appeals of Maryland, have determined that a state claim remains "pending" not only until its dismissal by a federal district court as § 1367(d) specifies, but also until the disposition of any subsequent federal appeal of right. *See Kendrick v. City of Eureka*, 98 Cal. Rptr.2d 153, 154 (Cal. Ct. App. 2000); *Turner*, 406 Md. at 189, 957 A.2d at 996-97 (App. 29-30); *Huang v. Ziko*, 511 S.E.2d 305, 307-08 (N.C. Ct. App. 1999). The Maryland court further concluded that a claim remains "pending" in the federal appellate court for purposes of § 1367(d) throughout the pendency of any subsequent petition for rehearing en banc, the entertainment of which is, by Federal Rule, discretionary. *See Turner*, 406 Md. at 189, 957 A.2d at 996-97 (App. 29-30); Fed. R. App. P. 35(a). The Maryland Court of Appeals left open the question whether the tolling effect also would continue during the filing and resolution of a petition for certiorari to this Court. *Turner*, 406 Md. at 189, 957 A.2d at 997 (App. 30). Other courts have decided it would not. *See, e.g., Okoro v. City of Oakland*, 48 Cal. Rptr. 3d 260, 264 (Cal. Ct. App. 2006); *Clark v. Velsicol Chem. Corp.*, 431 S.E.2d 227, 229-30 (N.C. Ct. App. 1993), *aff'd*, 444 S.E.2d 223 (N.C. 1994).

C. The Proper Interpretation And Application Of 28 U.S.C. § 1367(d) Require Resolution By This Court.

These conflicts of authority concerning the construction and application of 28 U.S.C. § 1367(d) are likely to remain unresolved unless and until this Court provides guidance, for several reasons. First, the splits are unlikely to resolve themselves because 28 U.S.C. § 1367 as a whole lacks clarity. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 549 n.2 (2002) (Ginsburg, J., concurring in part and concurring in the judgment) ("The supplemental jurisdiction statute, well-reasoned commentary indicates, is clearly flawed and needs repair.") (citations and internal quotation marks omitted); *see also* 13B Wright, Miller, & Cooper, *Federal Practice & Procedure*, § 3567.1 n.51 (2d ed. 2000 Supp.) ("[S]ection 1367 could have been more clearly drafted"). The statutory words "tolling" and "pending" are particularly challenging to construe, given their inherent variety of meaning and their usage within the statute. *See Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983) (discussing various meanings and effects of the word "tolling"); *Turner*, 406 Md. at 184, 957 A.2d at 993 (App. 22) ("Section 1367(d) is hardly a model of clarity" in its use of "pending")). Section 1367(d)'s imprecise drafting and use of terms with a multiplicity of meanings have resulted in inconsistent interpretation by courts and resulting uncertainty for litigants.

The present case represents a suitable vehicle for deciding both disputed aspects of the interpretation of 28 U.S.C. § 1367(d). The Court of Appeals of Maryland

interpreted the meaning of both pertinent statutory terms, "tolled" and "pending," and both interpretations were necessary to its holding and disposition of the case. *See Turner*, 406 Md. at 175-89, 957 A.2d at 988-98 (App. 11-30). Had the Maryland court not determined that "tolled" meant "suspended," then the limitations period for Respondent's state law claims would have expired in the ordinary course, without interruption or suspension, in April 2003, three years after the alleged events on which those claims were based. The April 2003 deadline for refiling Respondent's state law claims would have applied regardless of the district court's prior dismissal of those claims in March 2002, had the Maryland court not also determined that Respondent's state law claims remained "pending" while Respondent continued litigating her remaining, purely federal, claims before both the federal trial and appellate courts until March 2005.

II. THE INTERPRETATION OF 28 U.S.C. § 1367(d) ADOPTED BY THE COURT OF APPEALS OF MARYLAND IS CONTRARY TO PRINCIPLES OF FEDERALISM AND CONGRESSIONAL POLICY.

This Court should resolve the disagreement among state courts, and between state and federal courts, concerning proper interpretation of 28 U.S.C. § 1367(d) and its tolling effect on state statutes of limitation by establishing a rule consistent with this Court's prior decisions and the federal policies that § 1367(d) was enacted to promote. That rule would require that when a federal district court declines to

exercise supplemental jurisdiction over state law claims, and consequently dismisses them after the limitations period for those claims has expired, the claimant may refile them in state court, but only within a 30-day period following the dismissal. Such an interpretation would best implement Congress's intent in enacting § 1367(d), which was promoting efficient administration of the judicial system, fairness to litigants, and comity between state and federal courts.

"Congress enacted the supplemental jurisdiction statute, 28 U.S.C. § 1367, as part of the judicial Improvements Act of 1990," *Raygor*, 534 U.S. at 540, in order to improve the efficiency of the federal judiciary system and the judicial process. The statute's purpose was to "promote . . . the just, speedy, and inexpensive resolution of civil disputes." S. Rep. 101-416, 101st Cong., 2nd Sess. (1990), 1990 U.S. Code Cong. & Admin. News 6802, 6804. Congress further recognized that "[h]igh costs, long delays and insufficient judicial resources all too often leave this time-honored process unfulfilled." *Id.*

Accordingly, Congress intended that § 1367(d) would provide "a straightforward tolling rule" that is "conducive to the administration of justice." *Jinks*, 538 U.S.at 463. The interpretation of § 1367(d) that the Petitioners advocate in this case fulfills those objectives, whereas the interpretation adopted by the Court of Appeals of Maryland does not. Interpreting § 1367(d) as providing a 30-day period for refiling of otherwise time-barred state law claims after their dismissal by a district court creates a straightforward

rule that is simple for litigants to understand and for courts to apply consistently. By contrast, the alternative interpretation of § 1367(d) that the Court of Appeals has adopted requires calculation of the remaining "unexpired" limitations period for each state law claim following federal dismissal. Such a standard is neither straightforward nor conducive to the efficient administration of justice, because it requires applying differing limitations periods for differing state law causes of action, for which the exact dates of accrual often are unclear and disputed, such as in instances where the discovery rule applies.

The Maryland court's interpretation of 28 U.S.C. § 1367(d) also creates perverse incentives to prolong federal litigation in order to maximize the time period available for prosecuting state law claims. In the present case, for example, Respondent's persistent protraction of her federal lawsuit, by filing multiple requests for reconsideration and a meritless appeal, has inured to her benefit, and to the State and County Parties' detriment, by greatly prolonging the time period during which she may pursue her state law claims. The federal district court dismissed those claims on March 26, 2002, more than a year *before* the applicable limitations period expired. Respondent neither refiled her state law claims in state court at that time, nor subsequently asked the Fourth Circuit to review the district court's dismissal of those state law claims. Instead, she awaited the ultimate disposition of her *federal* suit, then refiled her stale *state* claims in state court when the result of the federal litigation proved unsatisfactory to her. The Court of Appeals of Maryland concluded that through

such tactics, by means of the operation of 28 U.S.C. § 1367(d), Respondent permissibly could revive and refile her state law claims, almost five years after the events that prompted them, and almost two years after the limitations period expired.

Respondent thus has obtained advantages unavailable to similarly situated litigants who file their state law claims initially in state court, to the detriment of defendant Petitioners. The quality and quantity of evidence inevitably diminish over time, and so to does the ability of defendants to mount an effective defense.[2] *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, *reh'g denied*, 415 U.S. 952 (1974) ("[S]tatutory limitations periods are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.") (citation and internal quotation marks omitted).

28 U.S.C. § 1367(d) is intended not only to promote efficiency, but to apply fairly to all litigants. The statute is protective of claimants, in that it "prevent[s] the limitations period on [dismissed] supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks*, 538 U.S. at 459. Nevertheless, the statute also is meant to "promote for *all citizens*," including defendants, "the just, *speedy*, and inexpensive

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[2] As an instance of the diminishing availability of witnesses over time, at least one defendant in this action, Theresa L. Hicks, no longer is in the employ of the County.

resolution of civil disputes." S. Rep. 101-416, 101st Cong., 2nd Sess. (1990), 1990 U.S. Code Cong. & Admin. News 6802, 6804 (emphasis added). The interpretation of § 1367(d) that Petitioners advocate appropriately balances those interests by allowing a claimant to refile otherwise time-barred claims in state courts after their federal dismissal, but also reasonably limiting the permissible time for refiling to 30 days following that dismissal. *See Kolani* , 75 Cal. Rptr. 2d at 261 (holding "30 days is ample time for a diligent plaintiff to refile his claims and keep them alive").

The interpretation of the Court of Appeals of Maryland, by contrast, unjustifiably favors claimants to the detriment of defendants and runs contrary to the sound policies underlying statutes of limitation. Statutes of limitation "represent a public policy about the privilege to litigate" and "are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). They thereby serve the policy of "ensuring essential fairness to defendants." *See Am. Pipe*, 414 U.S. at 554.

28 U.S.C. § 1367(d) also reflects a careful and considered balance between state and federal interests. *See Jinks*, 538 U.S. at 464 (rejecting argument that § 1367(d) "violates principles of state sovereignty"); *but see Raygor*, 534 U.S. at 544 (concluding that interpreting § 1367(d) "to extend the time period in which a state sovereign is amenable to suit in its own

courts at least affects the federal balance in an area that has been a historic power of the States."). The Court of Appeals of Maryland and other courts adopting its view of § 1367(d) have disrupted that balance, contrary to congressional intent, by applying § 1367(d) to extend state-enacted limitations periods beyond the 30-day period stated in the statute. In this case, for example, the Court of Appeals of Maryland concluded that § 1367(d) "prevails" over a state procedural rule, Maryland Rule 2-101(b), which expressly provides that an action filed in federal district court, subsequently dismissed on jurisdictional grounds, then refiled in state court "within 30 days after the entry of the order of dismissal shall be treated as timely filed." *See Turner*, 406 Md. at 190, 957 A.2d at 997 (quoting Md. Rule 2-101(b)) (App. 30-31). Courts that have adopted such positions, whether from a desire to safeguard the interests of claimants at the expense of defendants or from a mistaken belief that federal law compels that result, have created an unwarranted tension between federal and state law.

State statutes of limitation represent a State's careful legislative balancing of competing policy interests. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) ("A State's interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations."); *see also id.* at 736 (Brennan, J., concurring in part and concurring in the judgment) ("The statute of limitations a State enacts represents a balance between, on the one hand, its substantive

interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law.").

It is error, and contrary to principles of federalism, for courts to construe a federal procedural statute in a fashion that needlessly overrides the policy determinations manifested in state statutes of limitations. The Court of Appeals of Maryland, and other state courts that have interpreted 28 U.S.C. § 1367(d) in the same fashion, have thus committed error that merits this Court's attention and correction.

CONCLUSION

For the stated reasons, the petition for a writ of certiorari to review the judgment of the Court of Appeals of Maryland should be granted.

Respectfully submitted,

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IN THE COURT OF APPEALS
OF MARYLAND

No. 5

September Term, 2008

SHERRI A. TURNER

v.

RAYMOND A. KIGHT, et al.

Bell, C.J.
Harrell
Battaglia
Greene
Eldridge, John C. (Retired,
Specially Assigned)
Raker, Irma S. (Retired,
Specially Assigned)
Wilner, Alan M. (Retired,
Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: October 7, 2008

The question before us is whether petitioner's complaint was erroneously dismissed by the Circuit

Court for Montgomery County on the ground that the causes pled were barred by limitations. That question hinges on the proper construction to be given to 28 U.S.C. § 1367(d), which provides for the tolling of State statutes of limitations with respect to State-law claims (i) that are brought in a U.S. District Court, (ii) that are within the "supplemental jurisdiction" of that court, but (iii) over which the court eventually declines to exercise jurisdiction. We interpret § 1367(d) differently than did the Circuit Court and the Court of Special Appeals.

BACKGROUND

On May 15, 2001, petitioner filed an 19-count complaint in U.S. District Court against Montgomery County, the county sheriff, several assistants in the sheriff's office, and officials and employees of the county detention center, all based on certain events that occurred on April 19 and April 21, 2000. Twelve counts of her complaint were brought under 42 U.S.C. § 1983 and alleged violations of petitioner's Federal Constitutional rights; seven counts were based on rights afforded by the Maryland Constitution or by Maryland common law. The details of the events complained of are not especially germane to this appeal, and it will suffice to say that all of the claims arose from the execution of an arrest warrant issued by a Maryland court and the treatment of petitioner once she was in custody.

On March 26, 2002, the District Court filed a Memorandum Opinion and Order in which it entered summary judgment in favor of the defendants on ten of the Federal claims, dismissed the remaining two, declined to exercise jurisdiction over the seven pendant State-law claims, and directed the clerk to close the case. On April 5, however, petitioner filed a timely motion for reconsideration which, on August 7, 2002, the court granted as to one Federal-law count against one defendant but otherwise denied. In its Order, the court directed the clerk to reopen the case.

On August 20, 2003, the court filed a Memorandum Opinion and Order granting the defendants' renewed motion for summary judgment on the one count under reconsideration. That produced another motion for reconsideration by petitioner which, on December 22, 2003, the court denied.[1] On January 15, 2004. petitioner filed an appeal to the U.S. Court of Appeals for the Fourth Circuit.

Although the briefs filed in the Federal appellate court are not in the record before us, it appears from the Opinion of that court that the appeal concerned the judgments entered on petitioner's Federal claims. Finding no error with respect to those judgments, the court, on January 7, 2005, filed an Opinion affirming them. Unhappy with that result, petitioner moved for

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[1] The judge signed the order denying the motion for reconsideration on December 10, 2003, but it was not docketed until December 22.

a rehearing *en banc,* which, on March 8, 2005, the court denied. The appellate mandate affirming the District Court judgments was issued March 16, 2005, and was docketed in the District Court on March 21. That mandate terminated the Federal action.

The action now before us, which the parties seem to agree is a repetition of the State-law claims that were filed in the Federal court, was filed in the Circuit Court for Montgomery County on March 11, 2005.[2] Some of the defendants in the current action have not been served. Those who were served filed or joined in a motion to dismiss based on limitations. The limitations argument presented by those defendants was essentially as follows: (1) the applicable statute of limitations with respect to petitioner's claims is three years (Maryland Code, § 5-101 of the Cts. & Jud. Proc. Article), (2) the causes of action here arose in April, 2000, (3) this action was not filed until March, 2005, long after the period of limitations expired, (4) Md. Rule 2-101(b) provides, in relevant part, that, if a State-law action is filed in U.S. District

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[2] The complaint filed in Federal court is not in the record before us, so we cannot compare the two complaints. The record indicates that the State-law claims filed in Federal court comprised seven counts, founded on violations of the Maryland Constitution and Maryland common law. The complaint filed in Montgomery County consists of eighteen counts, all premised on violations of the Md. Decl. of Rights and common law tort. Despite the difference in the number of counts, we accept the parties' apparent agreement that the claims pled in the instant case are, indeed, the same as those pled in the Federal case.

Court and that court declines to exercise jurisdiction over it, an action filed in a Maryland circuit court within 30 days after entry of the order of dismissal by the Federal District Court shall be treated as timely filed, (5) this action was not filed in the Circuit Court within 30 days after dismissal of the claims by the U.S. District Court, and (6) the action was therefore not timely under the Rule.

Petitioner's response was based not on a construction of Rule 2-101(b), but on 28 U.S.C. § 1367(d), which she argued had the effect of interrupting the running of the statute of limitations from the time the action was filed in Federal court (May 15, 2001) until 30 days after the March 16, 2005 appellate court mandate, and that, as a result, less than thirteen months had actually run on the statute. The Circuit Court rejected that construction of § 1367(d), concluded that the statute of limitations continued to run and had expired while the case was pending in the U.S. District Court, that petitioner's only safety net was the 30-day window commencing when the claims were dismissed by the District Court, and that she failed to meet that requirement.

Upon that analysis, the court dismissed the actions against those defendants who had been served and denied a motion for reconsideration. Upon a consent motion, the court purported to enter a final judgment with respect to the served defendants under Md. Rule 2-602, apparently on the theory that, absent such an order, an appeal could not proceed because there remained several unserved

defendants.[3] In a reported opinion, the Court of Special Appeals agreed with the trial court's conclusion that § 1367(d) does not suspend the running of the statute of limitations, but merely provides that if the period of limitations expires while the case is pending in a U.S. District Court, the period is extended until 30 days after dismissal of the claims by the District Court. *Turner v. Kight,* 178 Md. App. 1 (2007). We granted *certiorari* to consider three issues:

(1) Whether § 1367(d) serves (i) to suspend the running of limitations during the period that the State-law claims are pending in Federal court, so that, when those claims are dismissed, the plaintiff has as much time remaining as he or she had when the claims were filed in Federal court (plus 30 days), or (ii) merely to extend the limitations period until 30 days after the claims are dismissed if the period otherwise expires while the Federal action was pending;

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[3] There was no need for an entry of judgment under Rule 2-602. In *State Highway Admin. v. Kee,* 309 Md. 523, 529 (1987), we made clear that a "named defendant who has not been served is not a party for the purpose of determining a final judgment" and that, if the judgment entered by the court disposes of all claims against all persons over whom the court has acquired jurisdiction, the judgment is final without a certification under Rule 2-602(b). *See also Burns v. Scottish Development Co., Inc.,* 141 Md. App. 679, 690 (2001). It would appear that such was the situation here and that the Rule 2-602 order was therefore unnecessary. Since an appeal could have been taken without it, however, it is at best a surplusage.

(2) Whether the 30-day grace period commences when the State-law claims are dismissed by the U.S. District Court or when all Federal proceedings that may affect them, including appellate proceedings, are concluded; and

(3) Whether Md. Rule 2-101(b) can be read in harmony with § 1367(d).[4]

We shall conclude that § 1367(d) does, indeed, suspend the running of limitations and does not merely extend the period, that the suspension remains in effect until 30 days after all Federal proceedings, including appellate proceedings, are concluded, and that Rule 2-101(b) can be read in harmony with § 1367(d), as so construed.

SECTION 1367

28 U.S.C. § 1367 was enacted as part of the Judicial Improvements Act of 1990. Although we shall comment further on the legislative history of that section, it will suffice at this point to note only that the section was intended to codify (and, to some extent, modify) existing case law regarding the extent to which a U.S. District Court, when presented in a civil action with a claim that is within its original jurisdiction, coupled with a claim that is not otherwise within its jurisdiction, could exercise "pendent,"

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[4] We have taken the liberty of restyling the questions presented in the petition for *certiorari* for clarity.

or "ancillary," or "supplemental" jurisdiction over the latter if it arose from the same conduct as the former.[5] Section 1367 contains four operative subsections. We are concerned with three of them – subsections (a), (c), and (d).[6]

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[5] The terms "supplemental," "pendent," and "ancillary," as modifiers of "jurisdiction," are occasionally used as if they were synonyms, and, with the enactment of § 1367, as a practical matter they are. As explained by Justice Ginsburg, writing in dissent in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 579-80, 125 S. Ct. 2611, 2632, 162 L. Ed.2d 502, 533-34 (2005), § 1367 codified under the heading of "supplemental jurisdiction" the separate court-created doctrines of pendent and ancillary jurisdiction. Pendent jurisdiction, she notes, "involved the enlargement of federal-question litigation to include related state-law claims." Ancillary jurisdiction was applied principally in diversity jurisdiction cases "to protect defending parties, or others whose rights might be adversely affected if they could not air their claims in an on-going federal-court action. Given jurisdiction over the principal action, federal courts entertained certain matters deemed ancillary regardless of the citizenship of the parties or the amount in controversy."

Although the two doctrines developed separately, the Supreme Court has recognized that they were "two species of the same generic problem" and that, under § 1367, there remains no "meaningful, substantive distinction" between them. *Exxon Mobil Corp. v. Allapattah Services, Inc., supra*, 545 U.S. at 559, 125 S. Ct. at 2621, 162 L. Ed.2d at 521, quoting in part from *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370, 98 S. Ct. 2396, 2401, 57 L. Ed.2d 274, 280 (1978).

[6] Subsection (b) contains certain exceptions to the grant of supplemental jurisdiction under subsection (a), none of which are applicable to this case, and subsection (e) defines terms that are not in dispute.

Subsection (a), which provides for the grant of supplemental jurisdiction, states, in relevant part, that in any civil action over which the U.S. District Courts have original jurisdiction, they "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Subsection (c) specifies four circumstances under which the District Court may decline to exercise that supplemental jurisdiction, one of which is that the court has dismissed all claims over which it has original jurisdiction. That is what occurred in this case.[7] Subsection (d) – the section at issue here – provides, in relevant part, that "[t]he period of limitations for any claim asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

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[7] Subsection (c) permits the District Court to decline to exercise supplemental jurisdiction over the State-law claims if:

"(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

The first question before us is what Congress meant when it declared that the period of limitations "shall be tolled." The second is what it meant by "while the claim is pending."

The rules governing the construction of Federal statutes are well-established. The preeminent canon requires the court to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183, 124 S. Ct. 1587, 1593, 158 L. Ed.2d 338, 345 (2004), quoting from *Conn. Nat'l. Bank v. Germain,* 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149, 117 L. Ed.2d 391, 397 (1992). If "the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis." *Zuni Public Schools Dist. No. 89 v. Department of Educ.,* 550 U.S. 81, 127 S. Ct. 1534, 1543, 167 L. Ed.2d 449, 461 (2007); *CSX Transp., Inc. v. Georgia State Bd. of Equalization,* ___ U.S. ___, 128 S. Ct. 467, 474, 169 L. Ed.2d 418, 429 (2007). On the other hand, the interpretation of a word or phrase as used in a statute is not always governed by a dictionary definition of the word in isolation, but "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service,* 546 U.S. 481, 486, 126 S. Ct. 1252, 1257, 163 L. Ed.2d 1079, 1087-88 (2006). Extrinsic materials, such as legislative history, "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting

Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Services, Inc., supra,* 545 U.S. at 568, 125 S. Ct. at 2626, 162 L. Ed.2d at 526-27. We have applied these same principles in construing Maryland statutes. *See Comptroller v. Science Applications,* 405 Md. 185, 198, 950 A.2d 766, 773 (2008).

Tolling

The threshold question is whether, in the context of the issue before us, the phrase in § 1367(d) that the period of limitations "shall be tolled while the claim is pending" has a clear meaning that must be applied or is ambiguous and thus requires interpretation. We have regarded statutory language as ambiguous if it has more than one reasonable interpretation. *Anderson v. The Gables,* 404 Md. 560, 572, 948 A.2d 11, 19 (2008); *Barbre v. Pope,* 402 Md. 157, 173, 935 A.2d 699, 709 (2007); *Green v. Carr Glass,* 398 Md. 512, 522, 921 A.2d 235, 241 (2007). Unquestionably, under that test, the language is ambiguous. Most of the courts that have been called upon to construe the meaning of "tolled" as used in the context of statutes of limitations, including under § 1367(d), have recognized that the term can have more than one meaning. The Supreme Court gave the clearest recognition of that in *Chardon v. Fumero Soto,* 462 U.S. 650, 652, n.1, 103 S. Ct. 2611, 2614, n.1, 77 L. Ed.2d 74, 78, n.1 (1983):

> "'Tolling effect' refers to the method of calculating the amount of time available to file suit after the tolling has ended. The statute of limitations might merely be suspended; if so, the plaintiff must file within the amount of time left in the limitations period. If the limitations period is renewed, then the plaintiff has the benefit of a new period as long as the original. It is also possible to establish a fixed period such as six months or one year during which the plaintiff may file suit, without regard to the length of the original limitations period or the amount of time left when tolling began."

See also Philip Morris v. Christensen, 394 Md. 227, 262-65, 905 A.2d 340, 361-63 (2006); *Ryan v. Roman Catholic Bishop of Providence,* 941 A.2d 174, 180, n.12 (R.I. 2008): ("Depending on the context, the word 'tolling' can have various meanings in legal writing").

Several of the cases dealing with the application of § 1367(d) acknowledge, tacitly or directly, that the phrase in question could be construed in different manners, and, indeed, the courts have split on what the proper interpretation should be. If the learned appellate judges around the country cannot agree on the meaning and application of the phrase, it cannot be said to have only one reasonable interpretation.

In the most recent exposition of this point, *Goodman v. Best Buy, Inc.,* 755 N.W.2d 354 (Minn. App. 2008), the Minnesota court concluded that three different interpretations appear, at least initially, to

be possible. First, citing *Chardon,* the court noted that the statutory language "could mean that section 1367(d) would 'annul' the state limitations period completely and replace it with a fixed period: the 30-day period after federal dismissal." 2008 WL 4006996 at 2. That is, in essence, a *substitution* approach: a Federal statute of limitations is substituted for the State statute. Alternatively, it might mean that § 1367 "would only toll the *expiration* of the state limitations period." *Id.* That interpretation, it said, "treats that period in the statute – the federal claim period plus thirty days – as a single span of time. If the state limitations period runs out during that span, the thirtieth day after dismissal becomes the new deadline." *Id.* at 3. That would appear to be an *extension* approach: if the limitations period under State law expires during the pendency of the Federal action, it is simply extended until the 30th day after dismissal of the pendent claims. As the Minnesota court observed, that would produce the same result as the first approach.

The third possibility is that the "shall be tolled" language means that "the state limitations period is *suspended* – i.e., the clock is stopped and the time is not counted – while the federal court is considering the claim and for thirty days after the claim is dismissed." *Id.* at 3. That is a *suspension* approach: upon dismissal of the pendent claims, the plaintiff would have whatever time was left under the State statute of limitations when the action was filed in Federal court plus 30 days.

All three of these alternative interpretations have been presented to the courts, and, as noted, the courts are not in agreement as to which is the proper reading. The intermediate appellate courts of North Carolina and New Jersey, one intermediate appellate court in California, and the Supreme Court of the Commonwealth of the Northern Mariana Islands (a U.S. Territory) have clearly opted for the *extension* approach and rejected the *suspension* alternative. *See Huang v. Ziko,* 511 S.E.2d 305 (N.C. App. 1999); *Estate of Fennell v. Stephenson,* 528 S.E.2d 911 (N.C. App. 2000); *Harter v. Vernon,* 532 S.E.2d 836 (N.C. App. 2000), *appeal dismissed and disc. review denied,* 546 S.E.2d 97 (2000), *cert. denied,* 532 U.S. 1022, 121 S. Ct. 1962, 149 L. Ed.2d 757 (2001); *Berke v. Buckley Broadcasting Corp.,* 821 A.2d 118 (N.J.Super.A.D. 2003), *cert. denied,* 832 A.2d 322 (2003); *Kolani v. Gluska,* 64 Cal. App.4th 402 (Cal. App.2d Dist. 1998); *Juan (Zhang) v. Commonwealth,* 2001 WL 34883536 (N.M.I. 2001). With no discussion, the Supreme Court of Alabama and an intermediate appellate court in Florida appear to have applied an *extension* theory as well. *See Weinrib v. Duncan,* 962 So.2d 167 (Ala. 2007); *Dahl v. Eckerd Family Youth Alternatives, Inc.,* 843 So.2d 956 (Fla. App.2d Dist. 2003). That, of course, is the approach adopted by the Court of Special Appeals in this case.

Three courts – in Minnesota, California, and Pennsylvania – have opted for the *suspension* approach. *See Goodman v. Best Buy, Inc., supra,* 755 N.W.2d 354; *Bonifield v. County of Nevada,*

94 Cal. App.4th 298 (Cal. App.3rd Dist. 2001); and *Oleski v. Department of Public Welfare,* 822 A.2d 120 (Pa. Cmwlth. 2003). Given these disparate interpretations, we must try to discern, as best we can, what Congress intended. To do that, we shall consider the reasoning of the courts that have already addressed the issue, how tolling has been construed in related contexts, and what insights may properly be gained from looking at the legislative history of § 1367(d).

To the extent that the courts provided any analysis, the ones that have adopted the *extension* approach have done so by regarding § 1367(d) as a form of equitable tolling, even though it is statutorily based, and concluding that the *extension* approach provides the most appropriate balance, in that it suffices to serve the Congressional purpose of preserving pendent State-law claims from dismissal under State statutes of limitations and constitutes the least intrusion on State law. The *Kolani* court found the *suspension* approach to be unreasonable:

> "Such a construction is not needed to avoid forfeitures, because 30 days is ample time for a diligent plaintiff to refile his claims and keep them alive. Further, such a construction does significant harm to the statute of limitations policy."

Kolani v. Gluska, supra, 64 Cal. App.4th at 410.

Similarly, the New Jersey court in *Berke* expressed the view that "[d]espite its ambiguous use of

the word 'tolling,' we do not believe that the federal statute intends a result that would permit a gross protraction of the limitations period in clear contravention of the underlying policy of statutory limitations on the time for bringing suit." *Berke v. Buckley Broadcasting Corp., supra,* 821 A.2d at 123. That view also drove the North Carolina decisions. In *Huang v. Ziko, supra,* 511 S.E.2d 305, 308, the lead case in that State, the court observed that the *suspension* approach "is contrary to the policy in favor of prompt prosecution of legal claims."

The Minnesota court in *Goodman,* in adopting the contrary *suspension* approach, did so by a process of elimination based on the structure of § 1367(d). The *extension* approach, it said, would apply only if the period allowable under the State statute of limitations expired while the action was pending in Federal court: "if the state deadline does *not* fall during that span of time, the state period of limitations is deemed to have continued running, unaffected by section 1367(d)." *Goodman v. Best Buy, Inc., supra,* 755 N.W.2d at 357-58. Tolling, if defined in that manner, would occur only when a particular condition is met – expiration of the limitations period during the pendency of the Federal action. The court noted, however, that the tolling provided for in § 1367(d) is not conditional. The statute says that the period of limitations "shall be tolled" and thus requires tolling in every case. As a matter of statutory construction, therefore, § 1367(d) cannot be read as adopting an *extension* approach.

The court then concluded that the *substitution* approach also could not be squared with the statute. If Congress intended *that,* it would have designated a specific moment in time at which the substitution was to occur, but it did not do so. The statute does not say that any new Federal statute of limitations is to commence *when* the action is filed in Federal court or *upon* the filing of the Federal action, but simply tolls limitations *while* the action is pending and for 30 days thereafter, suggesting merely the suspension of an on-going, existing period of limitations.

The *Bonifield* court, rejecting the *extension* approach of its sister court in *Kolani,* relied more on the generic meaning of "tolling," as defined in an earlier California case. In that case, *Woods v. Young,* 807 P.2d 455, 461 (1991), the California Supreme Court observed that "[t]olling may be analogized to a clock that is stopped and then restarted" and that "[w]hatever period of time that remained when the clock is stopped is available when the clock is re-started." Following that view, the court in *Bonifield* concluded:

> "To toll the statute of limitations period means to suspend the period, such that the days remaining begin to be counted after the tolling ceases. . . . Therefore, by tolling the statute of limitations 'while the claim is pending [in federal court] *and* for a period of 30 days after it is dismissed unless State law provides a longer tolling period' (italics added), section 1367(d) operates at a minimum as follows: The days left in the statute

> of limitations period at the time the federal claim was filed begin to run after the tolling ceases, i.e., on the 31st day after the federal claim is dismissed."

Bonifield v. County of Nevada, supra, 94 Cal. App. 4th at 303-04.

Bonifield's view of the more commonly applied conception of tolling is correct. It is the approach taken by *Black's Law Dictionary* (8th Ed. 2004) which defines "tolling statute" as "[a] law that interrupts the running of a statute of limitations in certain situations, as when the defendant cannot be served with process in the forum jurisdiction." *Id.* at 1525. It was the approach taken by the Supreme Court in *Chardon v. Soto, supra,* 462 U.S. 650, 103 S. Ct. 2611, 77 L.Ed.2d 74, dealing with whether a Puerto Rico statute of limitations was merely suspended or began to run anew following the denial of class certification in a 42 U.S.C. § 1983 class action. The Court there construed the word "tolling" to mean that "during the relevant period, the statute of limitations ceases to run." *Id.* at 652, n.1, 103 S. Ct. at 2614, n.1, 77 L. Ed.2d at 78, n.1. *See also American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 554, 94 S. Ct. 756, 766, 38 L. Ed.2d 713, 727 (1974); *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 353-54, 103 S. Ct. 2392, 2397-98, 76 L. Ed.2d 628, 635-36 (1983); *Ball v. Wal-Mart Stores, Inc.,* 34 F. Supp.2d 424 (S.D. Miss. 1998). We have followed that approach as well. *See Philip Morris v. Christensen, supra,* 394 Md. at 264, 905

A.2d at 362 and *Bertonazzi v. Hillman,* 241 Md. 361, 216 A.2d 723 (1966).

The point made by the *Kolani* court, that an extension approach is entirely satisfactory to avoid forfeitures and that a suspension approach is not necessary to achieve that objective, is undoubtedly true. The fact that a better mechanism – one less intrusive on State sovereignty and interests – could, or perhaps *should,* have been chosen does not require a conclusion that Congress intended that mechanism if the language it used indicates otherwise. The intent of Congress must be measured by what it said, not by what it might have said. It used the word "tolled" without qualification, presumably aware of how that word had previously been interpreted and applied by the Supreme Court, in *Chardon, American Pipe,* and *Crown Cork & Seal,* among other cases, and we can find nothing in the legislative history of the statute to indicate that it intended any other meaning.[8] We

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[8] Under any of the three approaches, § 1367(d) would serve to "trump" State statutes of limitation and thus constitute a significant intrusion on State law and sovereignty. Even before the enactment of that law, and certainly afterward, there was a lively debate among law professors as to its Constitutionality, and, indeed, the Minnesota and South Carolina Supreme Courts found the law to be unconstitutional. *See Regents of University of Minnesota v. Raygor,* 620 N.W.2d 680 (Minn. 2001); *Jinks v. Richland County,* 563 S.E.2d 104 (S.C. 2002). The U.S. Supreme Court was able to avoid the Constitutional issue in *Raygor* by holding, as a matter of statutory construction, that § 1367(a) did not apply to claims against an unconsenting State possessing Eleventh Amendment immunity (*Raygor v. Regents of Univ. of*

(Continued on following page)

agree, therefore, with the *Goodman*, *Bonifield*, and *Oleski* courts that § 1367(d) must be read as adopting the suspension approach.

Pending

We turn to the second question – how long does the suspension last? If the District Court declines to exercise its supplemental jurisdiction over pendent State-law claims and there is an appeal, does the 30-day grace period commence upon the dismissal of the claims by the District Court or upon the conclusion of the appellate process?

So far as we can tell, that issue has been considered in only two cases, both in California. In *Kendrick v. City of Eureka*, 82 Cal. App.4th 364 (Cal. App. 1st Dist. 2000), the plaintiffs filed suit in U.S. District Court in February, 1995, based on events that occurred a month earlier. In June, 1997, the court, having granted summary judgment on the Federal

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Minn., 534 U.S. 533, 122 S. Ct. 999, 152 L. Ed.2d 27 (2002)). The Constitutional debate ended, however, when the Court, fully aware of the effect of § 1367(d) on State law and sovereignty, reversed the South Carolina ruling, which involved claims against a county, and unanimously held the statute to be within the power of Congress under Art. III, § 1 to constitute Federal courts inferior to the Supreme Court. *Jinks v. Richland County*, 538 U.S. 456, 123 S. Ct. 1667, 155 L. Ed.2d 631 (2003). We are not constrained, therefore, to give the statute a narrower reading than is otherwise warranted for fear that a broader reading might raise Constitutional concerns. *See Clark v. Martinez*, 543 U.S. 371, 125 S. Ct. 716, 160 L. Ed.2d 734 (2005).

claims, declined to exercise jurisdiction over the pendent State-law claims and dismissed them. The U.S. Court of Appeals affirmed the dismissal in June, 1998. The plaintiffs then sought *certiorari* in the Supreme Court, which was denied in February, 1999. A month later, they filed a complaint in State court, which was dismissed on limitations grounds.

The California appellate court affirmed the dismissal. Noting the absence of any decisions construing the word "pending," as used in § 1367(d), but relying on judicial construction of the term in other contexts, the court determined that there was "a consensus view that a matter remains 'pending' in the federal court system, at least arguably through appeal to the Courts of Appeals afforded as a matter of statutory right," but that there was no consensus with respect "to the effect of the certiorari procedure on the federal tolling statute." *Id.* at 370.

The court concluded that, because appeals to the U.S. Supreme Court were not afforded as of right, but were discretionary, and because the filing of a petition for *certiorari* does not affect the finality of the judgment or stay the mandate of the appellate court, that proceeding did not continue to toll the running of the State statute of limitations. In light of the fact that the petition for *certiorari* was denied, the court did not need to address whether a different result would obtain if the petition had been granted. Because the plaintiff did not file the State action within 30 days after issuance of the U.S. Court of Appeals mandate, the action was untimely.

Although, in light of the facts and the actual result, the conclusions expressed by the *Kendrick* court with respect to the continued tolling of limitations pending an appeal of right were *dicta,* that *dicta* was adopted by the court as a holding in *Okoro v. City of Oakland,* 142 Cal. App.4th 306 (Cal. App. 1st Dist. 2006). Citing *Burnett v. New York Central R. Co.,* 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed.2d 941 (1965) and two lower Federal court cases, the *Okoro* court concluded that "[t]he notion that a matter remains pending through the appellate process finds support elsewhere." *Id.* at 312.

Section 1367(d) is hardly a model of clarity in this regard. The only court called upon to construe the meaning of "pending," as used in that statute, had to rely on interpretations given to the word in other contexts. In part, that may be because the structure of the statute itself creates some ambiguity.

In contrast to the more general language of Art. III, § 1 of the Federal Constitution, which extends the judicial power of the United States to the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish," which would include, of course, the U.S. Courts of Appeal, all of the other parts of § 1367 focus specifically on proceedings in the District Court. Subsection (a) confers supplemental jurisdiction on the District Courts, not Federal courts generally; subsection (b) creates exceptions to the supplemental jurisdiction of the District Courts; and subsection (c) specifies when the District Courts

may decline to exercise their supplemental jurisdiction. Subsection (d), although providing that limitations remains tolled "while the claim is pending," ends the tolling 30 days after the claim "is dismissed," without accounting for appeals from the dismissal.

That omission, of course, is what creates the ambiguity. A strict and literal reading of subsection (d), in the context of the rest of the statute, could well lead to a conclusion that the tolling does indeed end 30 days after dismissal by the District Court – that the specific provision for when the tolling ends trumps any uncertainty over the meaning of "pending." Such a literal reading, however, would be at odds with the purpose of the statute, as recognized by the U.S. Supreme Court and as revealed in the statute's legislative history, and it is therefore not the only, or, as we shall conclude, the preferred interpretation.

The legislative history of § 1367 well documents the purpose of the statute, which was confirmed by the Supreme Court in *Jinks v. Richland County, supra,* 538 U.S. 456, 123 S. Ct. 1667, 155 L. Ed.2d 631 – the case sustaining its Constitutionality. It was intended to "eliminate[ ] a serious impediment to access to the Federal courts on the part of plaintiffs pursuing federal and state law claims that 'derive from a common nucleus of operative facts.'" *Id.* at 463-64, 123 S. Ct. at 1671-72, 155 L. Ed.2d at 640, quoting in part from *Mine Workers v. Gibbs,* 383 U.S.

715, 725, 86 S. Ct. 1130, 16 L. Ed.2d 218, 228 (1966). Justice Scalia explained:

> "Prior to enactment of § 1367(d), [plaintiffs] had the following unattractive options: (1) they could file a single federal-court action, which would run the risk that the federal court would dismiss the state-law claims after the limitations period had expired; (2) they could file a single state-law action, which would abandon their right to a federal forum; (3) they could file separate, timely actions in federal and state court and ask that the state-court litigation be stayed pending resolution of the federal case, which would increase litigation costs with no guarantee that the state court would oblige. Section 1367(d) replaces this selection of inadequate choices with the assurance that state-law claims asserted under § 1367(a) will not become time-barred *while pending in federal court.*"

(Emphasis added).

Statutes of limitations vary from State to State, depending, in part, on the nature of the action. Mostly, they range between two and six years, although there are some wider variations. If an action is filed relatively promptly and the U.S. District Court acts expeditiously, it may well be that the need for a tolling under § 1367(d) would exist *only* in the event of an appeal. Even where that is not the case, if an appeal is taken by either party and § 1367(d) does not continue the tolling during the appellate process,

the plaintiff will necessarily be faced with at least the third inadequate choice noted by Justice Scalia, of filing a new action in State court and hoping that the State court will stay proceedings while the plaintiff pursues (or defends) the appeal.

Two types of appeals can be taken from District Court decisions under § 1367. As in this case, if the court has dismissed the State-law claims only because it dismissed all of the Federal claims, the appeal is likely to be focused on the dismissal of the Federal claims. The State-law claims remain very much in play, however, for, if the dismissal of the Federal claims is reversed, the District Court's supplemental jurisdiction over those pendent claims will remain and likely will be exercised. Apart from any complaint about the dismissal of the Federal claims, appeals may also challenge more directly the decision to exercise or not exercise supplemental jurisdiction over the pendant State-law claims. *See Regan v. Starcraft Marine, LLC,* 524 F.3d 627 (5th Cir. 2008); *Novak v. MetroHealth Medical Center,* 503 F.3d 572 (6th Cir. 2007); *Williams Electronics Games, Inc. v. Garrity,* 479 F.3d 904 (7th Cir. 2007) (Decision not to exercise supplemental jurisdiction over State-law claims is reviewable for abuse of discretion); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n,* 48 F.3d 1260 (D.C.Cir. 1995) (Decision to exercise supplemental jurisdiction, rather than dismiss or remand the State-law claims to State court, is also reviewable for abuse of discretion).

In either situation, the plaintiff, having chosen the Federal forum, must necessarily await the appellate ruling before knowing whether that forum is viable. As noted, if the tolling ends 30 days after dismissal of the pendant claims by the District Court, the plaintiff will be forced to file a protective action in State court and hope that the court will agree to stay proceedings until the Federal appeal is concluded. The State court, possibly faced with judicially or legislatively imposed time standards for disposing of cases, may be reluctant to do that – to keep an open case on its docket for an indeterminate period of time with no activity on it – thereby forcing both parties to litigate in both systems, with the troublesome prospect of inconsistent decisions. The Congressional intent was to avoid that dilemma, and the full implementation of that intent can be realized only by construing § 1367(d) to continue the tolling throughout the appellate process. There is, indeed, some support for that construction in the legislative history of the statute.

The ultimate origin of § 1367 was the Federal Courts Study Act (102 Stat. 4644), being Title I of the Judicial Improvements and Access to Justice Act of 1988 (P.L. No. 100-702, 102 Stat. 4642), which established, within the Judicial Conference of the United States, a Federal Court Study Committee. That Committee, to be appointed by the Chief Justice of the United States, was to examine the problems then facing the Federal courts and to develop a long-range

plan for the future of those courts, including the types of disputes resolved by them.

The Committee was appointed in December, 1988, and made its final Report in April, 1990.[9] Among the broad range of recommendations ultimately made by the Committee was that Congress "expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base." *Report of the Federal Courts Study Committee,* Part I at 47. In order to minimize friction between the State and Federal courts, the Committee recommended that Congress "direct federal courts to dismiss state claims if these claims predominate or if they present novel or complex questions of state law, or if dismissal is warranted in the particular case by considerations of fairness or economy." *Id.* at 47-48.

On the heels of that Report, two law professors from the Western New England Law School took it upon themselves to draft a statute to implement that supplemental jurisdiction recommendation and to forward the draft to Congressman Robert W. Kastenmeier, who then chaired the Subcommittee on Courts, Intellectual Property and the Administration

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[9] We note with pride that one of the members of that Committee was Diana Gribbon Motz, later to serve with distinction on of the Maryland Court of Special Appeals and who now graces the U.S. Court of Appeals for the Fourth Circuit.

of Justice of the House Committee on the Judiciary.[10] With some modifications, that draft was included as § 120 of the Federal Courts Study Committee Implementation Act of 1990, H.R. 5381, and became § 1367.

One of the changes made from Professor Wolf's draft dealt with the issue at hand. Wolf's draft of subsection (d) provided that the period of limitations for any non-federal claim shall be tolled "while the claim is pending *in the district court* and for a period of 30 days after it is dismissed under subsection (c) unless state law provides for a longer tolling period." (Emphasis added). Although the text of Wolf's draft specifically referenced pendency in the District Court, in an explanatory statement, he characterized that provision as a tolling of limitations "while the non-federal claim is pending *in the federal court* and for 30 days after its dismissal." *Supra* at 695, n. 10. (Emphasis added). Kastenmeier and his co-sponsor, Congressman Carlos J. Moorhead, opted for the more general reference, and, as a result, H.R. 5381 provided, in proposed new § 1367(d), that the period of limitations shall be tolled "while the claim is pending *in Federal court* and for a period of 30 days after it is dismissed under subsection (c) unless State law

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[10] *See* Letter from Arthur D. Wolf to Robert W. Kastenmeier, June 8, 1990, included in FEDERAL COURTS STUDY COMMITTEE IMPLEMENTATION ACT AND CIVIL JUSTICE REFORM ACT, *Hearing Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice,* 101st Congress, Second Session on HR 5381, Sept. 6, 1990, Serial No. 124, at 686.

provides for a longer tolling period." (Emphasis added). *See Hearing Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, supra* at n.10, at 30.

During deliberations on H.R. 5381 in the House of Representatives, subsection (d) was amended to delete the words "in Federal Court." As passed by the House, the subsection provided that limitations shall be tolled "while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period." House of Representatives, 101st Congress 2nd Sess. H.R. REP. NO. 101-734 at 11. In the Senate, that part of H.R. 5381 was incorporated into H.R. 5316, the Judicial Improvements Act of 1990, and was enacted and signed into law without further change to § 1367(d).

What emerges from this history is a rejection of language that would have clearly tied the tolling to pendency of the State-law claim in the District Court and a decision to have the tolling continue while the claim is pending in the Federal courts generally. At the very least, that gives credence to giving the word its more general meaning and thereby more completely implementing the purpose of the law.

Upon this analysis, we conclude that § 1367(d) serves to suspend the running of a State statute of limitations from the time the State-law claim is filed in U.S. District Court until 30 days after (1) a final judgment is entered by the U.S. District Court dismissing the pendant State-law claims, or (2) if an

appeal is noted from that judgment, issuance of an order of the U.S. Court of Appeals dismissing the appeal or a mandate affirming the dismissal of those claims by the District Court. Because the issue is not presented here, we need not consider whether the tolling would continue in the event a petition for *certiorari* is filed with the Supreme Court. Upon entry of the District Court judgment or issuance of the appellate order or mandate, the plaintiff will have whatever time that remained when the claims were filed with the District Court plus 30 days in which to file the State court action. The action now before us was filed well within that period.

Rule 2-101(b)

Petitioner contends that there is a conflict between Md. Rule 2-101(b) and § 1367, and that the Rule must therefore yield to the Federal statute. Petitioner is correct that the Rule yields, but there really is no facial conflict. The Rule provides:

> "*Except as otherwise provided by statute,* if an action is filed in a United States District Court *or the court of another state* within the period of limitations prescribed by Maryland law and that court enters an order of dismissal (1) for lack of jurisdiction, (2) because the court declines to exercise jurisdiction, or (3) because the action is barred by the statute of limitations required to be applied by that court, an action filed in a circuit court

> within 30 days after the entry of the order of dismissal shall be treated as timely filed in this State."

(Emphasis added).

As the italicized language makes clear, the Rule, by its own terms, yields to any inconsistent statute, so, to the extent that § 1367(d), as we have interpreted it, provides a greater tolling than does the Rule, the statute prevails by virtue of the Rule itself. The Rule does have independent significance, however, as it applies not just to actions filed in Federal court but to those filed in the courts of other States, to which § 1367(d) has no application.

> JUDGMENT OF COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REVERSE JUDGMENT OF CIRCUIT COURT FOR MONTGOMERY COUNTY AND REMAND TO THAT COURT FOR FURTHER PROCEEDINGS; COSTS IN THIS COURT AND IN COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENTS.

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 00736

September Term, 2006

Sherri A. Turner

v.

Raymond M. Kight, et al.

Eyler, James R.,
Krauser,
Rodowsky, Lawrence F.,
(Retired, Specially Assigned)

JJ.

Opinion by Krauser, J.

Filed: December 19, 2007

Title 28 U.S.C. § 1367 provides that the statute of limitations applicable to a state claim pending in federal court is "tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." But,

what does "tolling" mean in the context of § 1367? That is the central question posed by this appeal.

According to appellant Sherri L. Turner, § 1367 expressly suspends the pertinent statute of limitations while a state claim is pending in federal court, and, in so doing, it impliedly grants the claimant the remainder of that period plus the 30 days specified by § 1367 to file the same claim in state court after dismissal of the federal action. But appellees Montgomery County, the Montgomery County Sheriff, the Director of the Montgomery County Department of Corrections and Rehabilitation, and certain members of the Corrections Department and the Sheriff's Office, take a narrower view of "tolling" in § 1367. That provision, they argue, does not suspend the running of the statute of limitations, but only its effect. As a result, the pertinent statute of limitations continues to run during the federal action, leaving the claimant, upon its expiration, with statutory grant of 30 days from the date of the dismissal of the federal action to file suit in state court.

In determining the meaning of "tolling," we are asked to decide, in short, whether § 1367 suspends the running of the applicable state statute of limitations or merely the effect of that statute during the pendency of the federal case. If we decide that tolling suspends only the effect of such a statute, but not its advancement, we are further asked to determine whether the 30-day grace period, provided by § 1367 for filing a state action, begins to run at the conclusion of the federal district court proceedings or, if

appealed, at the conclusion of the federal appellate process.

Because we conclude that § 1367 tolls the consequence, but not the progression, of a state statute of limitations, and that the 30-day period provided by § 1367 begins to run at the end of the federal district court proceedings, we shall affirm the judgment of the Circuit Court for Montgomery County dismissing the instant case as time-barred.

Background

Since only the procedural history of this case is relevant to this appeal, we need not recount the circumstances underlying the numerous allegations of official misconduct set forth in appellant's complaint. In sum, appellant claims that she was mistreated by members of the Montgomery County Sheriff's Office and of the County's correctional department on April 21, 2000, during her arrest by the former and detention by the latter. That purported mistreatment prompted her to bring, on May 15, 2001, an action under 42 U.S.C. § 1983[1] in the

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[1] 42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

(Continued on following page)

United States District Court for the District of Maryland against Montgomery County, the Montgomery County Sheriff, the Director of the Montgomery County Department of Corrections and Rehabilitation, and certain members of the Corrections Department and the Sheriff's Office.[2] She maintained that her constitutional rights had been violated in the course of her arrest and detention.

To her complaint, appellant later added state common law tort claims, such as intentional infliction of emotional distress and negligence, as well as purported violations of the Maryland Declaration of Rights. Her suit was cut short, however, when the federal district court granted summary judgment in favor of the defendants as to some of appellant's federal claims, dismissed others, and then declined to exercise jurisdiction over her state claims.

On April 5, 2002, appellant moved for reconsideration by the federal district court of her federal claims but not of her state claims. On August 20,

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suit in equity, or other proper proceeding for redress. . . .

[2] Specifically, the complaint named as defendants Montgomery County Sheriff Raymond M. Kight, and the following members of his office: Bruce P. Sherman; Rodney Brown, Richard Kane, Robin Lewis, William Pechnick, Eric Brown, and Brian Phillips, as well as the following employees of the Montgomery County Detention Center: Robert Andrews and Theresa L. Hicks. The complaint also named as a defendant Arthur M. Wallenstein, Director of the Correction and Rehabilitation Department.

2003, the federal district court granted that motion as to a single federal claim. But that scant victory proved short-lived, as that claim was subsequently disposed of on a motion for summary judgment. On September 2, 2003, appellant filed a second motion for reconsideration, which was denied by the federal district court on December 22, 2003.[3]

Three weeks later, on January 15, 2004, appellant noted an appeal to the United States Court of Appeals for the Fourth Circuit, challenging the lower federal court's rejection of her federal claims. Nearly one year later, on January 7, 2005, the Fourth Circuit affirmed the decision of federal district court as to each of appellant's federal claims, and, two months after that, on March 8, 2005, it denied appellant's petition for a rehearing en banc.

On March 11, 2005, three years after the federal district court declined to exercise jurisdiction over

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[3] There is a difference of opinion among the parties as to when appellant's second motion for reconsideration was denied. The State claims that that motion was denied on December 10, 2003, while the County claims it was denied on December 16, 2003, and appellant maintains it was denied on December 22, 2003. The federal district court docket provided in the record extract indicates that the federal district court denied the motion on December 10, 2003, but the order denying that motion was not filed on that date. Rather, the docket indicates that it was filed on December 22, 2003. Because the precise date of that filing has no effect on the conclusions we reach in this opinion, we will assume that appellant is correct and that December 22, 2003 is the date appellant's second motion for reconsideration was denied.

appellant's state law claims and almost five years after appellant's arrest and detention, appellant filed a complaint reasserting her state law claims in the Circuit Court for Montgomery County. Appellees responded by claiming that appellant's complaint was now barred by the applicable statute of limitations. The circuit court agreed with appellees and dismissed appellant's complaint as time-barred. It thereafter denied her motion for reconsideration. This appeal followed.

Discussion

Title 28 U.S.C § 1367 states in part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties

under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Thus, in accordance with § 1367, appellant's state claims were tolled while her action was pending in federal court. But what does "tolling" mean in the context of subsection (d) of that statute, the central question of this appeal? Appellant argues that it could only mean that the state three-year statute of limitations applicable to her claims was suspended during the pendency of her federal suit and that, consequently, the unspent portion of the statute's limitations period should have been tacked onto the statute's 30-day grace period in calculating whether her state claims were timely filed. Because she filed her claim in the federal district court on May 15, 2001, about one year and three weeks into the applicable statute of limitations period, she maintains that she had about one year and 49 weeks, plus the statutory 30-day grace period, to file her state claims after the dismissal of her federal suit, which, she insists, occurred on December 22, 2003, when the federal district court denied her second motion for reconsideration. Indeed, according to appellant's math, she had almost until the end of 2005 to file her state claims in the circuit court. And, since she filed her state claims on March 11, 2005, they were, she asserts, timely filed.

The United States Supreme Court has not addressed the "tolling" issue of § 1367(d) and no single interpretation of that term has emerged from those lower federal and state courts that have. But, it is fair to say that, of the few federal and state courts that have considered this question, a majority have held

that § 1367(d) tolls the effect, but not the advancement, of any limitations period pertaining to state claims that are awaiting decision in federal court. *See Williams Elecs. Games, Inc. v. Garrity,* 479 F.3d 904, 907 (7th Cir. 2007) ("[S]ection 1367(d) explicitly tolls the statute of limitations for 30 days after dismissal of a supplemental claim, to allow the plaintiff to refile the claim in state court without being time-barred."); *Long v. Bando Mfg. of Am., Inc.,* 201 F.3d 754, 761 (6th Cir. 2000) ("Section 1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal.") (quoting *Edmondson & Gallagher v. Alban Towers Tenants Ass'n,* 48 F.3d 1260, 1267 (D.C. Cir. 1995)). *See also Berke v. Buckley Broadcasting Corp.,* 359 N.J. Super. 587, 595 (2003) ("[T]he import of [§ 1367(d)] is simply to toll the running of the state statute of limitations from its customary expiration date until the expiration of a thirty-day period following conclusion of the federal action, that is, to provide a thirty-day grace period."); *Harter v. Vernon,* 139 N.C. App. 85, 91 (2000) ("'Under [§ 1367(d)], the state period of limitations for a plaintiff's pendent state claims is tolled for a period of thirty days after the federal district court has dismissed the plaintiff's claims. . . . '") (quoting *Estate of Fennell v. Stephenson,* 137 N.C. App. 430, 435 (2000)). Consequently, if the state limitations period expires before the federal suit is dismissed, the complainant has a statutory grace period of 30 days in which to file his state claims in state court under § 1367(d).

On the other hand, one state court has construed § 1367(d), as appellant suggests, to suspend the statute of limitations on state claims and to allow the unexpired portion to be tacked onto the 30-day grace period provided by that statute for filing state claims. *See Oleski v. Dep't of Pub. Welfare,* 822 A.2d 120, 126 (Pa. Commw. Ct. 2003). And the courts of another state have lent some, albeit inconsistent, support to this thesis: While the third district of the California Courts of Appeal has held that "[t]o toll the statute of limitations period" under § 1367(d) "means to suspend the period, such that the days remaining begin to be counted after the tolling ceases[,]" *Bonifield v. County of Nevada,* 94 Cal. App. 4th 298, 303 (2001) (citing *Woods v. Young,* 53 Cal.3d 315, 326, n.3 (1991)), the second district has held that § 1367(d) "does not allow [a] plaintiff to 'tack' onto the limitations period the full time during which his federal action was pending." *Kolani v. Gluska,* 64 Cal. App. 4th 402, 411 (1998). This conflict among the California appellate courts has not yet been resolved. *See Okoro v. City of Oakland,* 142 Cal. App. 4th 306, 311 n. 5 (2006) (recognizing, but declining to resolve, the conflict between the two conflicting appellate interpretations of 1367(d)).

Although there is no Maryland appellate decision addressing this issue, the Court of Appeals, in promulgating Rule 2-101(b) two years after the enactment of § 1367(d), in effect adopted the narrower interpretation of "tolling" in § 1367(d) that is favored, as noted earlier, by a majority of courts that have

considered this issue. That rule provides that "if asmissal . . . because the court declines to exercise jurisdiction . . . an action filed in a circuit court **within 30 days after the entry of the order** of dismissal shall be treated as timely filed in this State." (Emphasis added.)

Although there is no reference to § 1367 in the Rules Committee's reports concerning Rule 2-101(b), we presume that the Rules Committee, in proposing that amendment, and certainly the Court of Appeals in adopting it, was aware of § 1367. And, indeed, the 30 days that Rule 2-101(b) provides in which to file an action after the dismissal of the federal suit mirrors the 30-day grace period provided by § 1367(d). We therefore conclude that, in promulgating Rule 2-101(b), the Court of Appeals believed that that rule was consistent with the prescriptions of § 1367.[4]

Since Rule 2-101(b) requires complainants to file their actions within 30 days of the federal district court's entry of the order of dismissal, appellant had 30 days from the dismissal of her claim in federal district court to file her state claim in state court to avoid the state statutory scythe. But she did not file

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[4] Although appellant argues that Rule 2-101(b) is subordinate to § 1367(d) for the purposes of the Supremacy Clause, Article VI, cl. 2, of the United States Constitution, that argument is ultimately irrelevant because the Supremacy Clause would apply only if Rule 2-101(b) conflicted with § 1367(d) by providing a shorter tolling period than that federal statute, which is not the case here.

her complaint in state court until March 11, 2005, which was almost three years after the federal district court's first order dismissing her state claims on March 26, 2002, and more than one year after the federal district court's denial of her second motion for reconsideration. Thus, we hold that appellant's claim in the circuit court was barred by the statute of limitations and that the circuit court did not err in dismissing her complaint.[5]

We so hold notwithstanding appellant's claim that *Christensen v. Philip Morris USA, Inc.*, 162 Md. App. 616 (2005), *aff'd in part, vacated in part,* 394 Md. 227 (2006)[6], and *Bertonazzi v. Hillman,* 241 Md.

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[5] For purposes of this appeal, it does not matter, and we do not decide, whether appellant needed to file her state claims in the circuit court within 30 days of March 26, 2002 or within 30 days of December 22, 2003. Either way, her claims were barred by the statute of limitations because she did not file suit in circuit court until March 11, 2005.

[6] The Court of Appeals vacated the portion of this Court's judgment vacating the circuit court's grant of summary judgment in favor of defendant Giant Food, LLC ("Giant") and remanding the case to the circuit court for further proceedings in light of *Benjamin v. Union Carbide,* 162 Md. App. 173 (2005), because it had recently granted certiorari in that case, *Georgia-Pacific v. Benjamin,* 388 Md. 404 (2005), and had subsequently affirmed this Court's decision. *Georgia-Pacific Corp. v. Benjamin,* 394 Md. 59 (2006). The Court of Appeals therefore remanded that portion of this Court's judgment in *Christensen* to this Court with instructions to vacate the circuit court's grant of summary judgment to Giant and to remand the case to the circuit court for further proceedings in light of *Georgia-Pacific Corp.*

361 (1966), define "tolling" as suspending the running, rather than the effect, of a statute of limitations. Indeed, *Christensen* and *Bertonazzi,* upon inspection, provide little precedential ballast for appellant's teetering position.

Christensen addressed the issue of "tolling" but only as to equitable tolling in the context of a class action suit. Mrs. Christensen, individually and as the representative of her deceased husband's estate, brought a survival and wrongful death action against several cigarette manufacturers and sellers who had previously been sued in a class action by Maryland tobacco users and their families. *Christensen,* 162 Md. App. at 618-19. That class action had been decertified in a ruling issued by the Court of Appeals one year before Mrs. Christensen filed suit. *Id.* at 618, 621.

When the circuit court granted summary judgment in favor of the defendants on the grounds that Mrs. Christensen's suit was barred by the applicable statute of limitations, *id.* at 619, she appealed, claiming that that statute had been tolled during the pendency of the class action. *Id.* at 620. This Court reversed the circuit court's grant of summary judgment, holding that the commencement of the prior class action had, in fact, tolled the applicable statute of limitations. *Id.* at 659. Affirming that ruling, the Court of Appeals held no more than that "the pendency of a putative class action tolls the statute of limitations on the causes of action asserted in the class action complaint for the putative plaintiff class members[.]" *Christensen,* 394 Md. at 231. In so

holding, it stressed that a statute of limitations may be equitably tolled only where "two conditions are met: (1) there is persuasive authority or persuasive policy considerations supporting the recognition of the tolling exception, and (2) recognizing the tolling exception is consistent with the generally recognized purposes for the enactment of statutes of limitations." *Id.* at 238.

Because the *Christensen* Court considered only the question of equitable tolling in the context of a class action suit and confined its ruling to that specific doctrine in that particular situation, *Christensen* has no applicability here. The doctrine of equitable tolling is plainly not before us. Section 1367(d) creates a statutory, not an equitable exception, to the statute of limitations. And the Court of Appeals in *Christensen* had no occasion to consider whether, when a statute of limitations is tolled pursuant to a statute such as § 1367(d), the tolling effect of that statute suspends the running of a statute of limitations or merely its effect.

The other Maryland case appellant cites to buttress her interpretation of "tolling" in § 1367(d) is *Bertonazzi v. Hillman,* 241 Md. 361 (1966). In that case, the Court of Appeals held that, when an action is timely filed but in the wrong venue, the running of the statute of limitations is "interrupted" so that the claims are not time-barred when refiled in the correct circuit court. *Id.* at 366. But, as in *Christensen,* the holding of *Bertonazzi* was limited specifically to equitable tolling which, as we noted above, is not

applicable in this case. Moreover, as this Court subsequently observed in *Smith v. Cylus,* 147 Md. App. 78 (2002), the *Bertonazzi* Court's holding "'carved out a narrow exception'" that applies only to cases "'where the sole reason for the dismissal of the prior action was improper venue[].'" *Id.* at 82 (quoting *Walko Corp. v. Burger Chef Sys., Inc.,* 281 Md. 207, 213 (1977)). *Bertonazzi,* we stressed, "'stands alone, [] **confined to the special circumstances which culminated in the filing of the suit in the wrong county.**'" *Id.* (quoting *Walko,* 281 Md. at 213). Therefore *Bertonazzi,* like *Christensen,* is of little precedential value here.

Furthermore, were we to interpret § 1367(d) as appellant suggests – that is, as suspending the statute of limitations during pendency of a federal action and then allowing the unexpired portion to run from the conclusion of the federal action – the provision's 30-day grace period would be rendered largely superfluous. Only in limited circumstances, where a plaintiff filed her action in federal court right at the end of the statute of limitations period, would the extra 30 days provided by § 1367(d), be of any significance. Such an interpretation would ignore a time-honored canon of statutory construction frequently cited by this Court, that is, that a statute should be construed "if at all possible, so that all parts of it are in harmony, and 'no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory.'" *Stanley v. Stanley,* 175 Md.App. 246, 260

(2007) (quoting *Dep't of Health and Mental Hygiene v. Kelly,* 397 Md. 399, 420 (2007)).

Having determined that § 1367(d) tolls only the effect of an applicable state statute of limitations and not its progression, we turn next to the appellant's argument that her 30-day grace period under § 1367(d) ran not from the date that her last federal claim was rejected by the federal district court, but rather from the date that the Fourth Circuit denied her motion for a rehearing en banc on March 8, 2005. In other words, the appellant argues that the 30-day grace period provided by § 1367(d) begins not at the conclusion of federal district court proceedings, but at the conclusion of the federal appellate process. Thus, the complaint she filed in state court was timely, she maintains, because it was filed only three days after the Fourth Circuit denied her en banc request.

But, as appellees point out, appellant's interpretation of the grace period is inconsistent with the plain language of both § 1367 and Rule 2-101. Reading § 1367 not as a set of discrete phrases, but "as a whole, considering the interrelationship or connection among all of its provisions," as we are required to do, *Coburn v. Coburn,* 342 Md. 244, 256 (1996) (citing *Vest v. Giant Food Stores, Inc.,* 329 Md. 461, 466-467 (1993)), we conclude that the provisions of § 1367,

notably § 1367(a)[7]; § 1367(b); § 1367(c)[8]; and § 1367(d)[9], clearly provide that the period of limitations is tolled for any claim over which the federal district court declined to exercise supplemental jurisdiction "while the claim is pending and for a period of 30 days after it is dismissed." § 1367(d). Similarly, Rule 2-101(b) expressly states that "if an action is filed in a **United**

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[7] Section 1367(a) refers only to the federal district court, stating:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the **district courts** have original jurisdiction, the **district courts** shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

§ 1367(a) (emphasis added).

[8] Subsections (b) and (c), which are exceptions to subsection (a), also refer solely to the federal district court. Subsection (b) concerns "any civil action of which the **district courts** have original jurisdiction founded solely on [28 U.S.C. § 1332]," and subsection (c) lists the situations in which "**district courts** may decline to exercise supplemental jurisdiction over a claim under subsection (a). . . ."§ 1367(b), (c) (emphases added).

[9] Section 1367(d) states: "The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

States District Court . . . and that court enters an order of dismissal . . . because the court declines to exercise jurisdiction . . . an action filed in a circuit court **within 30 days after the entry of the order** of dismissal shall be treated as timely filed in this State." (Emphasis added.)

Nowhere does either § 1367(d) or Rule 2-101(b) suggest that the limitations period runs 30 days from the date that a federal appeals court disposes of the action. On the contrary, those provisions refer exclusively to the federal district court. Hence, we decline to interpret § 1367(d) to "'reflect an intent'" which is "'not evidenced in the plain and unambiguous language of the statute.'" *Chow v. State,* 393 Md. 431, 443 (2006) (quoting *Kushell v. Dept. of Natural Resources,* 385 Md. 563, 576 (2005)).

In any event, the only authority that appellant cites for this interpretation are two cases from other jurisdictions, *Berke v. Buckley Broadcasting Corp.,* 359 N.J. Super. 587, 595 (2003) and *Huang v. Ziko,* 132 N.C. App. 358, 362 (1999). And those cases are not only in conflict with Rule 2-101(b), which, as we earlier noted, reflects the Court of Appeals's interpretation of § 1367(d), but with a growing number of federal and state courts that share this interpretation. *See Cousins v. Howell Corp.,* 113 F. Supp. 2d 262, 274 n.9 (D. Conn. 2000) ("To the extent that the state statute of limitations may have run on this claim, 28 U.S.C. § 1367(d) provides that the period of limitations is tolled while the claim is pending in federal district court and for thirty days thereafter. . . .");

Weinrib v. Duncan, 962 So.2d 167, 169 (Ala. 2007) ("[Section] 1367(d) provides for the tolling of the limitations period for only 30 days after the federal district court enters its order of dismissal."); *Dahl v. Eckerd Family Youth Alternatives,* 843 So. 2d 956, 958 (Fla. App. 2 Dist. 2003) ("When the federal district court dismissed [plaintiff's] complaint, [§ 1367(d)] operated to toll the matter for 30 days so that she could timely file in state court.").

We further note that the commentary to § 1367(d) in the United States Code Annotated wisely advises plaintiffs that the safest route is to file their state claims in state court after their dismissal by a federal *district* court. Indeed, that commentary states in pertinent part:

> The dismissal moment should be taken to be the moment of dismissal in the district court. Even if an appeal is taken to a court of appeals from the district court dismissal, the party whose claim has been dismissed under § 1367 does best to commence the state action within the prescribed time measured from the district court dismissal, and not from some later appellate affirmance of it. Perhaps, after commencing the state court action in such a situation, the plaintiff can ask the state court to stay the action – now timely commenced and pending – while the federal appeal proceeds. **This seems to be the safest course until there is a definitive federal ruling about whether the 30-day period may be measured from an**

> **appellate determination. The matter is not addressed by the statute, and anything connected with the statute of limitations must be handled conservatively.**

(Emphasis added.)

Clearly, this is not a settled issue, and "until there is a definitive federal ruling" about whether the 30-day period "may be measured from an appellate determination," *id.*, there is certainly no basis for this Court to so hold.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

SHERRI A. TURNER,	:	
Plaintiff,	:	
v.	:	Civil No. 259759
RAYMOND M. KIGHT, ET AL.,	:	
Defendants.	:	

Rockville, Maryland

June 24, 2005

HEARING

WHEREUPON, the proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE MICHAEL D. MASON, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANTS:

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* * *

[5] PROCEEDINGS

THE CLERK: Civil Number 259759, Turner versus Kight, et al.

THE COURT: Counsel, if you will come forward and identify yourself, please?

MS. VIA: Good afternoon, Your Honor. Patricia Via for Montgomery County and related county defendants.

MS. PELTZMAN: Cynthia Peltzman for the State defendants.

THE COURT: Okay.

MR. BYRD: Good afternoon, Your Honor. Ralph Byrd for the plaintiff, Sherri Turner.

THE COURT: Okay. Good morning to all of you. Sorry to keep you waiting, I'm working with the attorneys in other cases to see if there's any possible resolution of a case that I have. But as they are mulling over things I'm going to try and see if I can address this, since you've been sitting here waiting.

Why don't we go forward on – I know we have the issue of the unserved defendants in your pursuit.

MR. BYRD: Yes, Your Honor. But they've subsequently, I filed a reply in which I showed that all but nine – all but two of the defendants have been served now –

THE COURT: Okay.

MR. BYRD: – by registered mail, certified – [6] certified mail, restricted delivery.

THE COURT: Well, let's take up the issue first of the motion to dismiss on –

MR. BYRD: Yes.

THE COURT: – the statute of limitations grounds. Okay? So, Mr. Byrd, you can have a seat, and –

MR. BYRD: Yes.

THE COURT: – which ever of you is going to argue first –

MS. VIA: Okay.

THE COURT: You can be seated. Just give me one second. Okay. Sorry, go ahead.

MS. VIA: Thank you, Your Honor.

Your Honor, this is the County's motion to dismiss, but, just so we're clear on the record, that there are three individual county defendants. I've been aware that one has been served, I haven't heard about the other two being served. But, be that as it may, the arguments that I'm going to make today would apply to the individuals, as well.

THE COURT: Okay, so it basically would apply – Well, if there's a ruling as to any served, the defendant, I can't issue an order as to unserved defendants, other than would be the law of the case.

MS. VIA: Absolutely, Your Honor. As if they are served, all we would do is re-file a motion.

[7] THE COURT: Right. Okay.

MS. VIA: And it seems kind of silly. But, in any event –

Okay, this lawsuit, Your Honor, just very briefly, arises out of the arrest of the plaintiff that occurred back in April of 2000.

THE COURT: Yes, I have the whole chronology.

MS. VIA: Okay, so you have the whole chronology. All right.

This lawsuit was filed here on April – excuse me, on march the 11th of 2005, clearly outside the scope – outside of the applicable statute of limitations for state constitutional state law claims. You know, if we went strictly by statue of limitations that would have run on the State claims in April of 2003.

THE COURT: Right,

MS. VIA: The plaintiff's argument here is that because they filed this federal case there's a saving provision that they're entitled to under either the Maryland rule, 2-101, or 28USC, section 1367.

Our position is, there is a savings provision there, but it's gone and they've lost any protections or savings that they would have gotten from either of those rules. And –

THE COURT: Well, is the dispute, as I understand it, that from your point of view it is a tolling statute. And what [8] a tolling statute does is it operates to bar a party from asserting the defense during the period where the statute is tolled. And under the federal statute it is tolled so long as the matter is pending, until there is a final judgement, plus 30 days.

MS. VIA: Yes.

THE COURT: As I understand it, from the plaintiff's standpoint, the tolling statute, in effect,

acts to either delay the accrual of the cause of action. Or, alternatively, all time during which the statute is tolled it simply is tacked on from the final event under the tolling statute.

MR. BYRD: That's correct.

THE COURT: That's the jest of it.

MS. VIA: As I understand their argument, yes. And you're correct in summarizing our argument.

And I think when you look at the rules, either the Maryland Rule 2-101B or the federal statute, it does not provide for any tacking or adding. And if it did, I believe those provisions would have said that very clearly. And here's why.

The case that the plaintiff cites, the *Jase* (phonetic sp.) case, that involved the soldiers and sellers civil relief act, that statute specifically had a provision in it where it said that applicable period where the person in military service is not around gets tacked onto any claim. You know, [9] any time where then they come back and they can file.

The statute, neither the statute, the federal statute nor the Maryland rule provide that. They're very clear in what they say. They say, it's toll during the time period of when you file your suit, and you get the additional 30 days after the Court has relinquished, its jurisdiction on those claims to then file, if the statute has run during that time period.

THE COURT: Yes.

MS. VIA: And in this case – And what we've tried to do Your Honor is, we've given them the benefit of all doubt here, and we've said – looking at the very last day when the case was pending before the United States District Court, because that's what the rules talk about, it doesn't talk about appeals or anything like that, it talks about dismissals or entries of dismissals by the United States District Court.

That last date – there were lots of motions, as you can gather from reviewing the –

THE COURT: Yes.

MS. VIA: – history. Motions for dismiss, motions for summary judgement, motions for reconsideration, additional motions for reconsideration. The very last order that came out of the United States District Court dismissing any and all claims relating to this was December 10th of 2003.

THE COURT: Right.

MS. VIA: Now, the statute would have normally have [10] run during that year, April of 2003. And by the language of 2101B, and the federal statute, what happens in that case is, you look to the day that the dismissal is entered, and giving them the benefit of the doubt – even though that dismissal in December only had to do with the one and only claim that the Court had retained jurisdiction of it, which was a federal claim.

But let's assume, for the purposes, to give them any extended periods and, you know, liberal constructions of this, that that's the date. Then he has 30 – or she has 30 days from December the 10th, which would have been January, roughly, January 10th, January 9th, 2004. This lawsuit was not filed until March 11th, that's a year and two months later.

In addition, Your Honor, what's interesting is when the Court, when the Federal Court first addressed the state claim, the state law issues – the first dismissal of everything occurred back in March of '02, that's when the Court granted both, all defendant's motions.

The plaintiff then filed a motion for reconsideration. Okay? So you would say that's still under consideration, the state claims were still under consideration by the Federal Court. The Court issued a order on that motion for reconsideration August the 7th, 2002. Okay?

THE COURT: Why do we even need to bother with this? Because under your theory the last order, by anybody's [11] admission, is December. It's not filed until May of '05, so what difference does it make?

MS. VIA: Okay. Well, my point was going to be, there was still time within the statutes of limitations for them to have filed. They could have gotten a stay if there was still some – You know, I'm just trying to show you that there were options for him if the thought he had to wait, or –

But the bottom line is, giving him the benefit of the doubt, December 10th of '03 was the last possible date that we could look at, which would have given him until January of '04.

And there's been no case law, that I could find, that says that you add on, that you tack on this time period to the end of this time period, as opposed to it acting as a tolling, and then you get that additional 30 days. And that's clearly what the language says. I mean, there's, I think the clear, the plain language is just that.

THE COURT: Okay.

MS. VIA: So, for those reasons, Your Honor, we would say that the case is untimely filed and should be dismissed.

THE COURT: Okay.

And the State joins in the motion?

MS. PELTZMAN: I do. I just, one brief comment.

Your Honor, what happened here, I mean, when the District Court dismissed those claims it really divested itself with jurisdiction over those claims. I saw nothing in any of [12] the Court's orders where it ever reassumed jurisdiction over those stayed claims.

This isn't a case where it was filed in state court, it was removed, and then at the end, you know, the state claims were remanded back. This was actually a complete divestiture of jurisdiction. There was never

any challenge, that I could find, where the District Court's declining to exercise supplemental jurisdiction was ever challenged. So, I've never seen that there's been any reassumption of jurisdiction over those claims by the District Court.

Now, there is, the only thing that I could find that's even remotely point, and it's cited in the comments to Maryland Rule 2-102(b), it's a case where Judge Mott (phonetic sp.) for the District Court actually looked at the effect of Rule 2-101(b). And that – without procedurally going into the reasons why, the District Court was looking at the operation of that rule.

What happened in that case was, the plaintiff filed, you know, according to the terms of the rule, the plaintiff actually filed a case with the state claims within 30 days. And Judge Mott said it was prudent, you know, the rule's ambiguous, it was prudent for the plaintiff to do that and they ask for a stay pending the outcome of the appeal of the federal claims in the Fourth Circuit.

So, the only case that I have been able to find that [13] is exactly on point is where the plaintiff did what Ms. Turner did not do in that particular case, and basically preserved the rights by filing within 30 days. But, other than that, the State would join in with the County's arguments, as well.

THE COURT: Okay.

MS. PELTZMAN: Thank you.

MR. BYRD: Yes, Your Honor.

First of all, with respect to the date at which the Federal Court divested itself with jurisdiction. By the very language of the State's order it said, "In light of the Court's," – I'm looking at the very first time the Court ruled with respect to those State claims.

It says, "In light of the Court's ruling on the federal claims under 42USC, section 1983, the Court will decline to exercise its pendant jurisdiction over plaintiff's remaining state claims. A court may be decline to exercise supplemental jurisdiction if all claims over which it has original jurisdiction have been dismissed."

It wasn't until December 10th, 2003, the date that you mentioned, that the Court dismissed all federal claims.

THE COURT: Okay.

MR. BYRD: So, that was the date.

THE COURT: I accept that.

MR. BYRD: Now, with respect to the tolling provision, I believe that the defendants just misunderstand the [14] fundamental meaning of the term "tolling". Black's Law Dictionary; "Tolling; stopping of a running of, as to toll the statute of limitations."

AM Juror (phonetic sp.), 169, "Tolling refers to suspending or stopping the running of a statute of limitations. It is analogist to a clock stopping then restarting. Tolling may either temporarily suspend

the running of the limitations period or delay the start of the limitations period."

In this particular case it would temporarily suspend the running of the limitations period. The limitations period was suspended from the period of time that the case was initially filed in Federal Court, that was May of 2001, until all Federal Court claims were dismissed, and that was December of 2003.

The statute of limitations was suspended during that period of time. The clock had stopped ticking and then it started ticking again in December of 2003. So, there was a period of time from the commencement of the –

THE COURT: But let me ask you about that, okay?

MR. BYRD: Yes.

THE COURT: Because, really, two things. One, if it was suspended and so the time is not accruing and you're going to be entitled to this time once it kicks out of –

MR. BYRD: Yes.

THE COURT: – Federal Court, okay?

[15] MR. BYRD: Yes.

THE COURT: Why would there be any need to give you an additional 30 days? Because you're going to have all that bank of time – or all that

time that you're banking while you're in Federal Court.

The other thing is, – think about this. Suppose that you filed in Federal Court at the end of the – the day before the statute ran, okay?

MR. BYRD: Yes.

THE COURT: So there's one day left on the statue of limitations –

MR. BYRD: Yes.

THE COURT: – that you filed in Federal Court. Then, if in fact – this rule, then, would, in effect, give you, or would make the statute of limitations, what? Three years and 30 days for your cause of action, because you tack on an additional 30 days. Right?

MR. BYRD: That's correct. You would –

THE COURT: So by rule they've expanded the statute of limitations.

MR. BYRD: Well, they would have – If you had, if I had filed the case one day before the expiration of the statute of limitations in Federal Court, that is when, that's the reason why you need the extra 30 days. If you file very close to the end of the statute of limitations, and the statute of [16] limitations would have otherwise expired while you were in Federal Court, say the very last day, well, then that's when you would need your additional 30 days.

You wouldn't need that additional 30 days if I had filed sometime, you know, many months prior to the expiration of the statute of limitations. That extra 30 days is a provision that protects the plaintiff just in case the plaintiff filed the case on the very last day of the statute of limitations in Federal Court.

So, then, that period of time that it's pending in Federal Court would be tolled. But that very day that the case is dismissed in Federal Court, that would be the end of the statute of limitations and the plaintiff wouldn't have time to go back into State Court. So they add the additional 30 days just in case the person filed the case in Federal Court on the very last day of the statute of limitations.

In my particular case I had more than two more years left on my statute of limitations at the time that I filed the case in Federal Court. So, there was really no need for the extra 30 days. And I'm not relying upon any extra 30 days, I'm only relying upon the period of time that the case was tolled while it was in Federal Court. I'm relying upon the period of time during which the clock stopped ticking in Federal Court, during the pendency of the case in Federal Court, and then started ticking again once the case was out of Federal Court, [17] out of District Court.

So, when we add on those months that the case was pending in Federal Court that gives me additional time after I'm out of Federal Court in which to file the case.

That's the definition of tolling, and that's the way it was applied in *Jinks*, (phonetic sp.) in the Supreme Court case where it stated that a particular period of time under the Sailor's and Soldier's Relief Act, that plaintiffs could not seek a remedy during the pendency of the war, during that whole period the statute of limitations was tolled. That should stop ticking and then started ticking once that period was over.

We're talking about –

THE COURT: Yes, but Maryland has similar provisions for persons who are under infirmities versus who are minorities. And I think there's even provisions for persons who are outside of the State, but there they specifically say, in the courts in judicial proceedings section, that the cause of action doesn't accrue, it's delayed. The accrual of the action is delayed until they reach their majority. Or that they can't assert, I think, – if the debtor –

MR. BYRD: Yes.

THE COURT: That he can't assert the statute until he has been back within the State, and the time runs from that point. So they make it –

MR. BYRD: Yes.

[18] THE COURT: – very clear. Whereas, if what you say is true, they wouldn't need it to say that, it would simply say the statute was tolled.

MR. BYRD: Well, that's what the federal statute does say. I'm not relying on the Maryland

statute, I'm relying upon 1367 for this. The federal statute, which is what uses the language "tolled" for a period. The federal statute is unambiguous, there's no other, really, way to be able to interpret the federal statute because it says that, "The period of limitations for any claim asserted under subsection A, and for any other claim of the same action shall be tolled while the claim is pending."

I mean, that's a whole period of time during which the statute of limitations is tolled and is suspended. The clock has stopped ticking.

THE COURT: But the case law says that the courts can – federal courts can, as necessary, for the administration of their courts, modify the statute of limitations if the State's enact to govern their courts. And if you interpret tolling as it basically doesn't count any of the time that you're in Federal Court against the State's statute of limitations, I mean, potentially, then, you have the federal courts extending the State's period of limitation by years and years and year, and unnecessarily so.

MR. BYRD: Well, I don't know about unnecessarily so, [19] Your Honor. But that's –

THE COURT: Well, for instance, –

MR. BYRD: – what *Jinks* –

THE COURT: – in your instance – in your instance, where you had two years left, there is nothing that would have prevented you from filing the action in state court back in December of '03 or

these January of '04. I mean, there's no reason you couldn't have done that.

MR. BYRD: Well, there was no reason that I couldn't have, but I didn't have to under the federal statute, because –

THE COURT: Because they, in your view, extended our statute of limitations from three years to five years.

MR. BYRD: Well, they didn't – not from three years, they extended it for the period of time that the case was pending in federal court. That's what the Supreme Court stated in Jinks was perfectly constitutional.

The Supreme Court, they just recently ruled on this very application of the statute, almost under the very same kinds of circumstances where a person was suing for a section 1983 case based upon police action that resulted in the death of an individual. During the period of time that the matter was in federal court the statute of limitations was tolled.

After the case came out of federal court the person sued in South Carolina state court for wrongful death and the [20] South Carolina court says that the federal statute can not do that, it can not extend the statute of limitations and it went to the supreme court. And it expressly stated that, yes, we could.

There's a, I've got a copy of the Jinks case –

THE COURT: I have it right here in front of me.

MR. BYRD: Oh, okay.

THE COURT: But doesn't the statute say – Okay, but the Rule 2-101 requires that the action be filed in Maryland within 30 days of the final action of the District Court.

MR. BYRD: Well, Your Honor, that has to be interpreted within the context of 1367.

THE COURT: Right.

MR. BYRD: Certainly. Say I had gone into, my client had gone into court 30 days after the wrongful, alleged wrongful activity occurred. Say my client had gone into court on the – it occurred in April of 2000, say my client went in in May of 2000. The other side filed their motion to dismiss and it was heard by the Federal Court in June of 2000, and was dismissed in July of 2000. So, I'm talking about 2000.

So, under the Maryland statute then, I would have otherwise had three years to the statute of limitations, but under the Maryland statute 2-101, if you take it literally, once the case went into federal court and was dismissed it would have chopped off two and a half years of my statute of [21] limitations. Because no matter how much time I would have had running left on my statute of limitations, once I went into federal court and it was dismissed I only had 30 days thereafter in which to file my case back in state court.

So, under that literal reading of Maryland Rule 2-101, whenever you file your case in federal court you've only got 30 days left, it would act to shorten the statute of limitations by years.

THE COURT: No, it doesn't say that. It says that any action filed within 30 days shall be treated as timely filed. It doesn't say that in the event it's not filed within 30 days, but it's otherwise timely, that it's going to be considered not timely. It doesn't say that.

MR. BYRD: Okay, well, that's precisely the point that I'm making with respect to this. Just the fact that it wasn't filed within the 30 days, but otherwise timely, under federal rule 1-367, that's what would have otherwise made it timely in this particular case. Then, Maryland Rule 2-101, which would have allowed you 30 days, when it was otherwise timely under 1-367, would have allowed me to file in state court.

THE COURT: Okay.

I understand the argument and I understand the positions of both sides, but I guess when I look at the statues, to harmonize the statute, I interpret totally as the [22] defendants do. That it is, that it can not be used as a defense during that period of time. It doesn't stop the clock, the clock continues to run.

And it can not be used as a bar to an action for at least 30 days after the action in federal court, if finally disposed of, which is designed to give the

litigants ample opportunity if they've lost in federal court to come to state court and file their action and still have a prompt resolution of the action. As opposed to simply tacking onto the end of the federal case any and all time that would have otherwise counted against the Maryland or the state statute of limitations. I don't think that's what it does. I don't think that's what it was intended to do. State

So, for that reason the motion to dismiss is granted.

Thank you.

MS. VIA: Thank you, Your Honor.

MS. PELTZMAN: Thank you, Your Honor.

THE CLERK: All rise.

(The proceedings were concluded.)

[23] ✓ Digitally signed by Robyn L. Wilson

DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC. hereby certifies that the foregoing pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

Civil No. 259759

SHERRI A. TURNER

v.

RAYMOND M. KIGHT, ET AL.

By:

/s/ Robyn L. Wilson
Robyn L. Wilson
Transcriber

(3)

No. 08-849

FILED
MAR 20 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RAYMOND A. KIGHT, ET AL.,

Petitioners,

v.

SHERRI A. TURNER,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Maryland

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QUESTIONS PRESENTED

Respondent sued petitioners on state and federal claims in federal court. The district court denied respondent's federal claims on the merits and then declined to exercise supplemental jurisdiction over the state claims. The Fourth Circuit affirmed the dismissal of the federal claims. Three days after the conclusion of the federal appellate proceedings, respondent refiled her state claims in state court.

The Questions Presented are:

1. Whether the Maryland Court of Appeals erred in adopting the consensus view that state law claims dismissed by a federal district court under 28 U.S.C. § 1367(c) remain "pending" for purposes of 28 U.S.C. § 1367(d) throughout a timely appeal from the court's dismissal of the related federal claims.

2. Whether this Court should grant review to decide whether 28 U.S.C. § 1367(d) grants a plaintiff a maximum of thirty days to refile her claims in state court when that question makes no difference to the outcome of this case because respondent refiled her claims within three days.

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STATEMENT OF THE CASE

The resolution of this case hinges on a single question: when does a state law claim cease to be "pending" for purposes of 28 U.S.C. § 1367(d) (2000)? There is no disagreement among the lower courts on this issue. Every court that has squarely addressed the issue – other than the intermediate state appellate court whose decision was reversed by the Court of Appeals of Maryland in this case – has reached the same conclusion: when a plaintiff appeals a federal district court's dismissal of her federal and pendent state claims, her state claims remain "pending" under Section 1367(d) until the conclusion of federal appellate proceedings.

1. While the decisive legal issue in this case is straightforward, the factual allegations and procedural history are more complicated.[1] In February 2000, respondent, Dr. Sherri A. Turner, missed a scheduled appearance in state court on a landlord-tenant matter because she was at the hospital attending to her fifteen-year-old daughter, who two days earlier had been struck by an automobile and severely injured. Appellant's Br. and

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[1] For purposes of reviewing a decision granting summary judgment or a motion to dismiss, this Court "take[s] the facts alleged by [the nonmoving party] to be true." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 724, 747 (1998) (using this standard in cases where summary judgment has been granted); *see Berkovitz v. United States*, 486 U.S. 531, 540 (1988) (using this standard in cases seeking review from a motion to dismiss).

Record Extract at 4, *Turner v. Kight*, 957 A.2d 984 (Md. 2008) (No. 00736).

In April 2000, petitioners Robin Lewis and William Pechnick, deputies with the Montgomery County Sheriff's Office, came to respondent's home to execute a warrant that had been issued for respondent's arrest on a charge of contempt of court relating to her failure to appear. Respondent explained to the officers that she had suffered a spinal cord injury in a 1997 automobile accident and was awaiting surgery, and that her daughter had recently been struck by a car. Rather than arrest her, the officers then gave respondent another opportunity to turn herself in; she did so two days later. *Turner v. Kight*, No. 04-1125, 2005 WL 32826, at *1 (4th Cir. Jan. 7, 2005).

Respondent arrived at the Montgomery County Sheriff's Office in the morning of April 21, 2000, with her fourteen-year-old daughter. After being instructed to leave her pocketbook with her daughter in the waiting room, respondent was taken to another room, where she was handcuffed to a table and arrested. She was searched and ordered to surrender all her belongings, including medicine and a neck brace which she had brought to alleviate pain and muscle spasms related to her spinal cord injury. Respondent was then driven to a holding cell at the District Court of Maryland of Montgomery County (MCDC) to await appearance before a judge. The judge set bail at $100, which respondent was unable to pay, and so she was again placed in detention at the MCDC. *Id.* at *1-*2.

During the period of respondent's detention, officers refused to answer her inquiries regarding the

welfare of her child, her right to a telephone call, the whereabouts of her neck brace, her ability to see a doctor, and her right to arrange bail. She was strip-searched and repeatedly taunted, all the while suffering excruciating pain from her spinal condition and denial of access to her medication and neckbrace. Respondent was finally released when her daughter posted the $100 bail, approximately twelve and one-half hours after respondent first arrived at the police station. *Id.* at *2.

2. On May 15, 2001, respondent brought suit in federal district court against Montgomery County and various individual officials under 42 U.S.C. § 1983, alleging multiple violations of her federal constitutional rights in the course of her arrest and detention. She then amended her complaint, adding state constitutional and common law tort claims. Respondent's state law claims had a statute of limitations period of three years under Maryland law. Pet. App. 4.

On March 26, 2002, the federal district court granted summary judgment in favor of the defendants on some of respondent's federal claims, dismissed others, and declined to exercise jurisdiction over the state claims.

Respondent timely moved for reconsideration of the district court's dismissal of her federal claims. On August 7, 2002, the federal district court agreed to reconsider one of the federal claims, but on August 20, 2003, it granted summary judgment in favor of the defendant on that claim as well. Respondent timely filed a motion for reconsideration of that judgment, which was denied on December 22, 2003. Pet. App. 3.

Respondent timely appealed to the Fourth Circuit, challenging the district court's rejection of her federal claims. On January 7, 2005, the Fourth Circuit affirmed the decision of the federal district court as to each of respondent's federal claims. Pet. App. 3.

Respondent timely sought rehearing en banc, and on March 8, 2005, the Fourth Circuit denied that request. Pet. App. 4.

3. Three days later, on March 11, 2005, respondent filed suit in the Circuit Court for Montgomery County reasserting her state law claims. Although the complaint was filed more than three years after her claims had accrued, respondent contended that her suit was timely under 28 U.S.C. § 1367(d), which provides that the "period of limitations" for an asserted pendent state law claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

The trial court nonetheless determined that respondent's suit was time-barred. Pet. App. 70-71.

Respondent timely appealed to the Maryland Court of Special Appeals, which affirmed, holding that Section 1367(d) did not suspend the running of the statute of limitations on respondent's state law claims, but merely provided an extra thirty days after the federal district court's dismissal of the claims. Because respondent's complaint in state court was filed nearly three years after the federal district court's initial dismissal of her state claims in March 2002, and nearly five years after her cause of action

accrued, the court concluded that respondent's suit was untimely. Pet. App. 42-43.

Respondent appealed to the Court of Appeals of Maryland, which reversed. That court held that respondent's state law claims were "pending" for purposes of Section 1367(d) until the Fourth Circuit's denial of rehearing on March 8, 2005. Since respondent had filed her state court complaint three days later, it was timely. Pet. App. 29-30. The court explained that when a federal district court dismisses state law claims because it has dismissed all related federal claims, "the appeal is likely to be focused on the dismissal of the Federal claims." Pet. App. 25. In these circumstances, the state law claims "remain very much in play" because if the district court is reversed, "the District Court's supplemental jurisdiction over those pendent claims will remain and likely will be exercised." Pet. App. 25. To hold otherwise, the court reasoned, would force plaintiffs wanting to appeal an adverse federal district court decision to "fil[e] a new action in State court and hop[e] that the State court will stay proceedings while the plaintiff pursues . . . the appeal," precisely the scenario Section 1367(d) was designed to avoid. Pet. App. 25.

The court also addressed Section 1367(d)'s tolling effect. The Maryland high court adopted the "suspension approach," under which "upon dismissal of the pendent claims, the plaintiff would have whatever time was left under the State statute of limitations when the action was filed in Federal court plus 30 days." Pet. App. 13 (emphasis omitted). It concluded that the suspension approach was most consistent with both the dictionary definition of

"tolling" and this Court's prior interpretations of the concept. Pet. App. 18. The court thus rejected petitioners' alternative "extension approach," under which "if the limitations period under State law expires during the pendency of the Federal action, it is simply extended until the 30th day after dismissal of the pendent claims." Pet. App. 13 (emphasis omitted). The court concluded that the extension approach was untenable "[a]s a matter of statutory construction." Pet. App. 16. Congress, the court reasoned, "used the word 'tolled' without qualification, presumably aware of how that word had previously been interpreted and applied by the Supreme Court . . . and we can find nothing in the legislative history of the statute to indicate that it intended any other meaning." Pet. App. 19.

REASONS FOR DENYING THE WRIT

This case involves the construction of two words that appear in 28 U.S.C. § 1367(d) – "pending" and "tolled." Because the outcome turns entirely on the meaning of "pending" – a legal question as to which there is neither a conflict among the lower courts nor any other reason warranting this Court's review – certiorari should be denied.

I. The Outcome Determinative Issue In This Case – When Respondent's Claim Ceased To Be "Pending" Under Section 1367(d) – Does Not Justify This Court's Attention.

A. The Outcome In This Case Turns Entirely On Construction Of The Word "Pending."

1. The timeliness of respondent's suit in this case turns entirely on the definition of "pending"; the meaning of the word "tolled" would have no effect, regardless of which interpretation this Court adopted.

Respondent's position in this case is clear. Her state law claims remained "pending" in federal court, for purposes of 28 U.S.C. § 1367(d), until March 8, 2005, when the Fourth Circuit denied her timely petition for rehearing en banc. Petitioners' position is equally clear: respondent's claims ceased to be pending on March 26, 2002, the date the district court first declined to exercise jurisdiction over her state law claims. Pet. 13.

Assuming that respondent's construction of "pending" is correct, the judgment below must be affirmed under any plausible construction of "tolled," including petitioners'. If respondent's claims were pending until the Fourth Circuit denied rehearing en banc on March 8, 2005, then even under petitioner's view, respondent had thirty days from that date to file her complaint in state court. Because respondent in fact filed her suit *three* days after the denial of rehearing en banc, her complaint was timely even under petitioners' reading of "tolled." *See* Pet. 8, 17-

18. Thus, if respondent's view of "pending" is correct, she would prevail under any construction of "tolled."

At the same time, if *petitioners'* view of "pending" were correct, there would be no occasion to decide what "tolled" means either, because so long as the Court accepts petitioners' definition of "pending," respondent would lose under any definition of "tolled." According to petitioners, respondent's state claims ceased to be pending in federal court on March 26, 2002, when the district court dismissed them. *See* Pet. 13. Respondent did not file those claims in state court until nearly three years later, on March 11, 2005. That three-year period would render respondent's state court filing untimely under any construction of "tolled," because the maximum remaining limitations period on respondent's claims was just under two years. Thus, if petitioners' construction of "pending" is correct, then respondent's state suit was untimely and this case does not present the opportunity to address the proper meaning of "tolled" in Section 1367(d).

In sum, under either party's construction of "pending," this case does not present a vehicle for resolving any disagreement over the tolling effect of Section 1367(d).

B. There Is No Disagreement Among Lower Courts On The Meaning Of "Pending" In Section 1367(d).

As petitioners' *amici* acknowledge, the issue of whether an action has been refiled in accordance with the time limits of 28 U.S.C. § 1367(d) arises only in *state* court. Br. of North Carolina et al. 4. Other

than the Maryland intermediate state court in this case, *see* Pet. App. 47-51, whose holding was reversed by the Maryland Court of Appeals, *see* Pet. App. 29-30, no state court has ever adopted petitioners' version of "pending." Rather, every court that has ruled on the issue has interpreted "pending" to include the entire federal appellate process. *See Okoro v. City of Oakland*, 48 Cal. Rptr. 3d 260, 264 (Cal. Ct. App. 2006) (citing *Kendrick v. City of Eureka*, 98 Cal. Rptr. 2d 153, 157 (Cal. Ct. App. 2000)); *Berke v. Buckley Broad. Corp.*, 821 A.2d 118, 124 (N.J. Super. Ct. App. Div. 2003); *Harter v. Vernon*, 532 S.E.2d 836, 839 (N.C. Ct. App. 2000); *Fennell v. Stephenson*, 528 S.E.2d 911, 914 (N.C. Ct. App. 2000); *Huang v. Ziko*, 511 S.E.2d 305, 308 (N.C. Ct. App. 1999); *Lucas v. Muro Pharm. Inc.*, No. 944052, 1994 WL 878820, at *2-*3 (Mass. Super. Dec. 2, 1994).

Faced with this consensus view of "pending," petitioners cite only a single recent case – and that from a *federal district court* and not a court of appeals. *See* Pet. 13 (citing *Jarmuth v. Frinzi*, No. 1:04CV63, 2006 WL 4730263 at *12 (N.D.W. Va. July 25, 2007), *aff'd sub nom. Jarmuth v. Waters*, No. 06-1908, 2007 WL 685175 (4th Cir. Mar. 7, 2007)). But that decision creates no conflict, for it refers to the issue only in passing dictum, and (as noted *supra*) the proper construction of Section 1367(d) arises in the lower courts only in the state, not the federal, system.[2]

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[2] On appeal in *Jarmuth*, the Fourth Circuit expressly declined to address the meaning of "pending," affirming the

C. A State Claim Remains "Pending" Under Section 1367(d) Until The Conclusion Of All Proceedings Before A United States Circuit Court Of Appeals.

The consensus position – that state law claims remain pending until the end of federal proceedings – is consistent with both the plain language and underlying purposes of Section 1367.

1. The plain meaning of the word "pending" demonstrates that a pendent state law claim remains pending until the federal courts have conclusively resolved all federal and state claims.

Legal dictionaries define the word "pending" as "remaining undecided" or "awaiting decision." BLACK'S LAW DICTIONARY 1169 (8th ed. 2004); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1669 (unabr. ed. 1993) (defining "pending" as "in continuance," "not yet decided," or "until the . . . completion of"). Each of these definitions supports respondent's position that a claim remains "pending" through the conclusion of federal proceedings, including a timely appeal. Petitioners cite not a single dictionary definition of "pending" that supports their truncated interpretation of the term.

This Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), is in accord. There, this Court held that an application for state collateral review was "pending" in state court for purposes of 28 U.S.C. § 2244(d)(2) during the interval between a lower court's

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decision on other grounds. *See Jarmuth v. Waters*, 2007 WL 685175, at *1.

determination and filing of a further original state habeas petition in a higher court. The Court explained that under the "ordinary meaning" of the word, a case is "pending" until its "final resolution" or "until the completion of" the review process. 536 U.S. at 219-20. Here, the federal process was not completed until March 8, 2005, when the Fourth Circuit denied respondent's timely petition for rehearing en banc.

The plain meaning of the word "pending" stated in dictionary definitions and adopted by this Court in *Carey* is the only interpretation of the term that makes sense. When a district court dismisses all federal and pendent state claims, reinstatement of the state law claims depends entirely on whether the appeals court reverses the district court's dismissal of the federal claims. If a federal appellate court reverses the district court's dismissal of federal claims, then the appeals court will normally reinstate a plaintiff's pendent state law claims. *See* 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3567.3 (3d ed. 2009 Supp.) ("[W]hen an appellate court reinstates a claim that invokes federal subject matter jurisdiction, it may also reinstate related state claims over which supplemental jurisdiction had been declined."); *see also, e.g.*, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 79 (2d Cir. 2003) (taking such action). Accordingly, a litigant whose federal and state claims have been dismissed does not abandon her state claims by appealing the dismissal of the federal claims; that is in fact, as the Court of Appeals of Maryland recognized, Pet. App. 25, a common and entirely sensible way of also contesting

the dismissal of the state claims. Here, if the Fourth Circuit had reversed the district court's dismissal of respondent's federal claims, she certainly would have pursued her state claims on remand as well. A plaintiff's pendent claims thus "remain[] undecided" and are therefore still "pending" until appellate proceedings are concluded.

Petitioners seek to insert into Section 1367(d) language that Congress specifically chose to omit. An initial, unintroduced draft of Section 1367(d) included the language, "shall be tolled while the claim is pending in the *district* court." *See* Letter from Prof. Arthur D. Wolf, Professor at Western New England College School of Law, to Hon. Robert W. Kastenmeier (June 8, 1990), *in Hearing on H.R. 5381 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 688 (1990) [hereinafter *H.R. 5381 Hearing*] (emphasis added). However, H.R. 5381 as introduced used the more general reference of "pending in *Federal* court." *See* H.R. 5381, 101st Cong. § 120(a) (1990) (as introduced in House, July 26, 1990) (emphasis added); *see also* Memo from Prof. Arthur D. Wolf to Charles G. Geyh, counsel, Subcomm. on Courts, Intellectual Property, and the Administration of Justice (July 12, 1990), *in H.R. 5381 Hearing*, at 704. Ultimately, the entire prepositional phrase "in Federal court" was deleted. *See* H.R. 5381, 101st Cong. § 114(a) (as reported by H. Comm. on the Judiciary, Sept. 21, 1990). Congress thus rejected tying tolling explicitly to dismissal by a district court. Accordingly, this Court should give the provision its more general meaning

and one that more completely implements the purposes of the law.[3]

2. Respondent's interpretation of "pending" reinforces the two purposes of Section 1367 – namely, to promote judicial economy and safeguard a plaintiff's ability to file in federal court.

First, Section 1367 was intended to enable federal courts "to deal economically – in single rather than multiple litigation – with related matters, usually those arising from the same transaction [or] occurence." H.R. REP. NO. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874; *see also Jinks v. Richland County*, 538 U.S. 456, 463-64 (2003) (stating that Section 1367 was intended to "eliminate[] a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal- and state-law claims that 'derive from a common nucleus of operative fact'" (quoting *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

Petitioners' view of "pending," however, undermines this goal. Under petitioners' interpretation, a significant risk arises that a state statute of limitations will run while a plaintiff is actually still litigating her claims in federal court. To

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[3] The unofficial commentary to Section 1367(d) included in the United States Code Annotated on which petitioners rely to support their version of "pending," *see* Pet. 13, is not binding guidance; it is merely a suggestion that recognizes that the term "pending" has not been definitively construed. Furthermore, the commentary does not preclude including federal appellate proceedings in the time that a claim remains "pending" under the statute.

avoid that risk, a plaintiff seeking a federal forum would have to file two separate lawsuits – one in state court covering her state claims, and another in federal court covering both her federal *and* state claims, and seek to stay the former. However, filing two different suits based on the same nucleus of facts leads to exactly the type of wasteful and duplicative litigation that pendent and supplemental jurisdiction were designed to avoid, and expends limited judicial resources that statutes of limitation were designed in part to preserve.[4]

Second, Section 1367 was designed to encourage filing of cases raising both federal and state law claims in federal court. *See* WORKING PAPERS AND SUBCOMMITTEE REPORTS OF THE FEDERAL COURTS STUDY COMMITTEE 557 (1990) (noting that "federal jurisdiction serves important federal interests" and that "[s]upplemental jurisdiction furthers these interests by making it easier for federal claimants to litigate their claims in a federal court"); *see also* H.R. Rep. No. 101-734, at 27-28 (1990). Petitioners' view of "pending" undermines this intended purpose by deterring plaintiffs from seeking a federal forum. A

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[4] Even if a plaintiff does pursue this "wasteful" option of duplicative filings, there is no guarantee that her stay in state court will be granted. If the state court issues a judgment before the federal court, the rule against claim splitting may give that judgment preclusive effect in the federal action, effectively depriving the plaintiff of her statutory right to a federal forum. This is the exact problem Congress sought to prevent in creating a Federal Courts Study Committee in the first place. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990).

plaintiff who is worried that the statute of limitations may run while her state claim remains under consideration by a federal Court of Appeals may feel compelled to forego her appeal as of right, *see* FED. R. APP. PROC. 4(a)(1), and refile her claim in state court. Petitioners' view of "pending" discourages plaintiffs from exercising that right.

If the Fourth Circuit had reversed the dismissal of any of respondent's federal claims, Section 1367(a) would have resulted in the district court once again also having supplemental jurisdiction over her state law claims. It makes no sense to say that respondent should nevertheless have filed a protective complaint in state court.

II. The Tolling Effect Of Section 1367(d) Is Not Squarely Raised In This Case And, In Any Event, Is Not Certworthy.

Perhaps recognizing that the outcome determinative issue in this case does not warrant this Court's review, petitioners try instead to focus attention on a different issue – the tolling effect of Section 1367(d). Petitioners' *amici* adopt a similar strategy, basing their argument for certiorari exclusively on that question while relegating to a single footnote discussion of the issue that actually resolves this case. *See* Br. of North Carolina et al. 3 n.3. But this case simply does not present an appropriate vehicle to determine the meaning of Section 1367(d)'s tolling provision. Even if it did, petitioners considerably overstate the extent and importance of any conflict on the issue. And in any event, the Court of Appeals of Maryland's decision is correct.

A. This Case Presents An Exceptionally Poor Vehicle For Addressing The Tolling Effect Of Section 1367(d).

Petitioners suggest that Section 1367(d)'s tolling provision "often is of dispositive importance to litigants prosecuting or defending actions containing both state and federal claims." Pet. 7. This choice of words is telling. While construction of the tolling provision may "often" be dispositive in other cases that could later be presented to this Court, it is not true here. As discussed above, the timeliness of respondent's state court filing – and therefore, the outcome of this case – depends entirely on when her state law claims ceased to be "pending" for purposes of Section 1367(d). *See supra* at 7-8.

Thus, if this Court were to grant certiorari to construe the tolling provision, there is very little prospect that the Court would actually reach the tolling issue. If, as petitioners contend, Section 1367(d)'s tolling provision presents a recurring question as to which courts across the nation actually require more guidance, then surely a case cleanly presenting that issue will soon come before this Court. In fact, the issue is squarely raised and outcome determinative in a case currently awaiting review by the Minnesota Supreme Court. *See Goodman v. Best Buy, Inc.*, 755 N.W.2d 354 (Minn. Ct. App. 2008).

B. Any Conflict Among State Intermediate Courts On The Tolling Effect of Section 1367(d) Does Not Warrant Review By This Court.

Vehicle problems aside, petitioners exaggerate the extent and importance of the conflict on Section 1367(d)'s tolling effect. The nascent disagreement among intermediate state courts on this issue does not warrant this Court's intervention.

1. The "tolling" issue that petitioners raise rarely matters. In the nearly two decades since Congress enacted Section 1367, only two state courts of last resort have addressed the meaning of Section 1367(d)'s tolling provision. In fact, this case represents the *only* decision involving an actual holding. The Maryland Court of Appeals became the first state supreme court to expressly decide the issue, concluding in the decision below that Section 1367(d) suspends the running of the state statute of limitations period during the entire time the state law claim is pending in federal court and for thirty days thereafter. *See* Pet. App. 13. The Maryland court's decision to reach the tolling issue was, however, unnecessary, because the outcome of the case was determined by its holding that respondent's claim remained "pending" until the Fourth Circuit denied her petition for rehearing en banc.

The only other state high court decision to consider the issue is the Supreme Court of Alabama's recent decision in *Weinrib v. Duncan*, 962 So.2d 167 (Ala. 2007), which stated that Section 1367(d) merely grants a plaintiff an additional thirty days to refile if the limitations period expires in the course of federal

court proceedings. *See id.* at 169-70. Though petitioners cite the decision as a holding, Pet. 10, the court's treatment of the tolling issue in *Weinrib* is dictum. In that case, the plaintiff filed suit in state court two days before the expiration of the state statute of limitations. The case was removed to federal district court, which granted summary judgment in favor of the defendant on the federal claim and refused to exercise supplemental jurisdiction over the state claim. The plaintiff did not appeal; instead, one year later, she refiled in state court. As a result, her refiled suit was untimely under *any* interpretation of Section 1367(d)'s tolling effect.[5]

2. Instead of pointing to a developed conflict among state courts of last resort, petitioners rely on a smattering of state intermediate court decisions in a few states. Three intermediate state courts have adopted petitioners' interpretation of Section 1367(d)'s tolling effect. *See Berke v. Buckley Broad. Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003); *Harter v. Vernon*, 532 S.E.2d 836 (N.C. Ct. App.

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[5] Petitioner also cites the District of Columbia Court of Appeals' decision in *Stevens v. ARCO Mgmt. of Wash. D.C., Inc.* *See* Pet. 10. Like the Supreme Court of Alabama, the District of Columbia Court of Appeals appears to have assumed, but did not decide, that Section 1367(d) simply provides a thirty-day extension of the statute of limitations. *See Stevens v. ARCO Mgmt. of Wash. D.C., Inc.*, 751 A.2d 995, 997 (D.C. 2000). Its discussion is pure dictum because the plaintiff filed suit within thirty days of the federal court dismissal, and the dispute centered on whether Section 1367(d) applied at all. *Id.* at 997-98.

2000); *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257 (Cal. Ct. App. 1998).[6] By contrast, three different intermediate state courts have held that Section 1367(d) suspends the running of the state statute of limitations period. *See Goodman*, 755 N.W.2d 354; *Oleski v. Dep't of Pub. Welfare*, 822 A.2d 120 (Pa. Commw. Ct. 2003); *Bonifield v. County of Nevada*, 114 Cal. Rptr. 2d 207 (Cal. Ct. App. 2002).

It would be premature for this Court to step in to resolve the disagreement among these intermediate courts before the states' own high courts have addressed the issue. The fact that so few have had the opportunity to do so belies petitioners' contention that Section 1367(d)'s tolling provision creates recurring and difficult problems for state courts. And if petitioners are right that the question arises frequently, the already thin conflict in these five states may diminish or disappear altogether as more state supreme courts weigh in.

3. Petitioners' citations to federal cases, Pet. 12, add nothing to its argument. As petitioners' own *amici* point out, the issue of the timeliness of an action refiled in state court under Section 1367(d) arises only in state courts. *See* Br. of North Carolina et al. 4-5. The federal courts of appeals have no

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[6] Petitioner cites *Dahl v. Eckerd Family Youth Alternatives*, 843 S.2d 956 (Fla. Ct. App. 2003), as having decided this issue as well, but the court's interpretation of the tolling effect in that case is dictum. The plaintiff refiled her claim within thirty days of dismissal by the federal court and therefore the tolling issue was not before the court. *Id.* at 958.

cause to decide the meaning of Section 1367(d)'s tolling provision. Accordingly, to the extent any federal decision has opined on the statute's application, the statements are plainly dicta.[7]

C. The Maryland Court of Appeals Correctly Held That Section 1367(d) Suspends The Running Of The Limitations Period On State Claims.

1. The dictionary definition of "toll," its interpretation in this Court and by other courts, and its use and context in Section 1367(d) all support the Court of Appeals' decision in this case.

Legal dictionaries define "toll" as "[t]o suspend or interrupt the running of the statute of limitations," BALLENTINE'S LAW DICTIONARY 1282 (1969), or "to stop the running of; to abate" specifically in the context of "a time period, esp[ecially] a statutory one," BLACK'S LAW DICTIONARY 1525 (8th ed. 2004). *See also* RANDOM HOUSE WEBSTER'S DICTIONARY OF THE LAW 431 (2000) (defining "toll" as "to suspend the running of the statute of limitations . . . . One speaks of circumstances that 'toll the statute' or 'toll the limitations period.'"). This definition squarely supports respondent's position and the position taken in the Maryland Court of Appeals: Section 1367(d)

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[7] Because federal courts "will never have occasion to pass upon whether an action was timely re-filed in state court under 28 U.S.C. § 1367(d)," Br. of North Carolina et al. 5, petitioners' contention that litigants are "subject to apparently divergent state and federal court interpretations" of Section 1367(d)'s tolling provision is meritless. *See* Pet. 12.

suspends the running of the limitations period while the claim is pending in federal court and for thirty days after its dismissal.[8]

Courts likewise have consistently defined "tolling" to mean that "during the relevant period, the statute of limitations ceases to run." *Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983); *see also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-55, 559 (1974) (using "toll" and "suspend" interchangeably); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004) ("[M]ost statutes use the word 'toll' when the purpose of the statute is to interrupt the statute of limitations."); *Hunter-Boykin v. George Washington Univ.*, 132 F.3d 77, 83 (D.C. Cir. 1998); *Detweiler v. Pena*, 38 F.3d 591, 593 (D.C. Cir. 1994).[9]

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[8] If Congress had simply wished to extend the limitations period by a specific amount of time after dismissal, as petitioners urge is the case with Section 1367(d), it would have done so directly, as it has in other statutes. *See, e.g.*, 10 U.S.C. § 843(e) (2000) ("[T]he period of limitation ... is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress."); 47 U.S.C. § 415(d) (2000) (stating that a "period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier"); 49 U.S.C. § 11705(d) (2000) ("The limitation period ... is extended for 6 months from the time written notice is given to the claimant ...."). By contrast, in Section 1367(d), Congress chose to use "toll[]," not "extend," to explain the statute's effect on the period of limitations.

[9] The cases petitioners cite to support their position of tolling either ignore the plain language in favor of policy-based arguments or offer no analysis at all. *See Huang v. Ziko*, 511

Petitioners cite *Chardon* to support the claim that "tolling" is "particularly challenging to construe, given [its] inherent variety of meaning." Pet. 15. But that decision supports respondent's interpretation of tolling. *Chardon* interprets "toll" as to suspend, and does not recognize any other interpretation of that term. Instead, the footnote on which petitioners rely explains that statutes may have differing "tolling *effect[s].*" 462 U.S. at 652 n.1 (emphasis added). As the Court recognized, Congress (and state legislatures) can write statutes that extend rather than suspend the limitations period, resulting in a "tolling effect" that departs from "the common-law rule of suspension." *Id.* at 655.[10]

But Congress did not adopt such a tolling "effect" in Section 1367(d). It instead flatly provided that the limitations period "shall be tolled," 28 U.S.C. §

S.E.2d 305, 308 (N.C. Ct. App. 1999) (omitting plain-language analysis, and instead deciding the issue because holding for plaintiff would be "contrary to the policy" it identified "in favor of prompt prosecution of legal claims"); *Berke*, 821 A.2d at 123 (relying on what it described as an "evident purpose of the statute . . . only to preserve a plaintiff's right of access to the state court for a minimum thirty-day period"); *Kolani*, 75 Cal. Rptr. 2d at 261-62 (ignoring the language of the statute, and instead deciding based on policy rationales); *see also Weinrib*, 962 So.2d at 170 (noting in dicta, without discussion, that Section 1367(d) only affords plaintiffs thirty days to refile in state court); *Dahl*, 843 So.2d at 958 (stating, without discussion, that Section 1367(d) "operate[s] to toll the matter for thirty days").

[10] The examples of statutes that the Court pointed to of "a variety of different tolling effects" did not use "toll" to describe their effect. *See Chardon*, 462 U.S. at 660 n.13.

1367(d), with no indication that it intended any other tolling mechanism than the standard one recognized in *Chardon* and elsewhere.

Furthermore, petitioners' interpretation violates the canon to "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). Section 1367(d) dictates that the "[t]he period of limitations . . . shall be tolled" over two periods: (a) "while the claim is pending," *and* (b) "for a period of 30 days after [the claim] is dismissed." Petitioners' interpretation of Section 1367(d), that it "limit[s] the refiling period to 30 days following . . . dismissal," Pet. 8, renders superfluous the first instance when tolling occurs: "while the claim is pending."

2. Not only does respondent's interpretation better fit the language and structure of Section 1367(d), it better fulfills that section's purposes as well. Congress enacted Section 1367 to ensure that plaintiffs with federal and state claims would file all claims "economically" in federal court "in single rather than multiple litigation." H.R. REP. NO. 101-734, at 28. By freezing the running of the state statute of limitations period regardless of time spent in federal court, Section 1367(d) ensures that plaintiffs are not disadvantaged by bringing their claims in federal court, maintaining the proper incentives for a plaintiff to bring all related claims in a single, federal forum.

The statute as respondent interprets it does not "create[] perverse incentives to prolong federal litigation." Pet. 18. A plaintiff with the burden of

proof and limited resources has every incentive to try a case early, while evidence and witnesses are still available. Plaintiffs would defer filing in state court only so they can fully pursue their federal rights first, as respondent did in this case. This is a goal that animated Congress's passage of Section 1367.

3. The suspension approach to tolling raises no federalism concerns. This Court has already rejected the argument that Section 1367(d) is not a "'proper' exercise of Congress's Article I powers because it violates principles of state sovereignty." *Jinks v. Richland County*, 538 U.S. 456, 464 (2003). Instead, this Court has found "that § 1367(d) is necessary and proper for carrying into execution Congress's power '[t]o constitute Tribunals inferior to the supreme Court,' U.S. Const., Art. I, § 8, cl. 9, and to assure that those tribunals may fairly and efficiently exercise '[t]he judicial Power of the United States,' Art. III, § 1." *Id.* at 462. In enacting Section 1367(d), Congress decided that protecting litigants' access to federal court for supplemental claims outweighs states' interests in having their statutes of limitations continue to run. Doing so was a proper exercise of Congress's powers. *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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March 20, 2009

125 (4)

No. 08-849

FILED
MAR 31 2009
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND A. KIGHT, et al.,
Petitioners,

v.

SHERRI A. TURNER,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Maryland

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No. 08-849

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REPLY BRIEF FOR THE PETITIONERS

THIS CASE IS A SUITABLE VEHICLE FOR PROVIDING GUIDANCE TO STATE AND SUBORDINATE FEDERAL COURTS ON THE PROPER INTERPRETATION AND APPLICATION OF 28 U.S.C. § 1367(d).

The petition for a writ of certiorari showed, and Respondent agrees, that this case involves two distinct, unresolved questions of federal law: the meanings of both "pending" and "tolled" as those terms are used in 28 U.S.C. § 1367(d). Respondent's contention that this case squarely presents only the first issue rather than both issues, and that the Court should await some future case to resolve inarguable uncertainty and

conflict in the lower courts (Br. in Opp'n at 6, 16), is mistaken.

Since Congress's enactment of 28 U.S.C. § 1367, the ambiguity of the two emphasized words has bedeviled courts:

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be *tolled* while the claim is *pending* and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d) (emphasis added).

Interpretation of both "tolled" and "pending," as used in 28 U.S.C. § 1367(d), is essential to resolution of this case, given its procedural history. The key events are summarized below:

Date	Event
04/21/00	Alleged mistreatment of Respondent
05/15/01	Respondent files complaint in federal district court asserting state and federal claims
03/26/02	Federal district court rules for Petitioners on all federal claims and declines to exercise supplemental jurisdiction over state law claims

04/05/02	Respondent moves for reconsideration of her federal, but not her state, claims
08/07/02	Federal district court grants reconsideration of one federal count against one Petitioner
04/21/03	Three-year state limitations period expires
08/20/03	Federal district court grants summary judgment for Petitioners on last federal count
09/02/03	Respondent moves for reconsideration of summary judgment on last federal count
12/22/03	Reconsideration of summary judgment on last federal count denied
01/15/04	Respondent appeals to the Fourth Circuit concerning only her federal claims
01/07/05	Fourth Circuit panel affirms dismissal of federal claims
01/21/05	Respondent petitions for rehearing en banc
03/08/05	Rehearing en banc denied
03/11/05	Respondent files a complaint reasserting her state claims in state court

A. This Case Is a Suitable Vehicle for Determining the Meaning of "Pending" in 28 U.S.C. § 1367(d).

As Respondent emphasizes (Br. in Opp'n at 7-8), deciding whether she timely refiled her state claims in March 2005, nearly two years after the state limitations period expired, requires a determination of how long her state law claims remained "pending" for purposes of 28 U.S.C. § 1367(d). Respondent acknowledges that the commentary to § 1367(d) in the United States Code Annotated "recognizes that the term 'pending' has not been definitively construed." (Br. in Opp'n at 13 n.3.) Respondent nevertheless contends that the meaning of "pending" needs no further clarification in this context. (*Id.* at 8-9.)

Respondent wrongly asserts that "every court that has ruled on the issue has interpreted 'pending' to include the *entire* federal appellate process." (*Id.* at 9 (emphasis added).) On the contrary, all of the courts that have addressed whether the "pending" period under 28 U.S.C. § 1367(d) includes the duration of discretionary federal appeals have excluded the period of those appeals from the period a claim remains "pending." *See, e.g., Kendrick v. City of Eureka*, 98 Cal. Rptr. 2d 153, 154, 157 (Cal. Ct. App. 2000) ("[S]ection 1367(d) continues to toll the state statute of limitations during the federal appeal period provided as a matter of statutory right, but tolling ceases once the district court decision is affirmed by the federal appellate court" and does not continue through subsequent request for "completely discretionary" review); *Clark v. Velsicol Chem. Corp.*, 431 S.E.2d 227,

229-30 (N.C. Ct. App. 1993) (holding that because a petition for writ of certiorari to this Court "is not an appeal of right, and no review is guaranteed once the petition is filed," a case is no longer pending for tolling purposes while decision on the discretionary petition is pending), *aff'd*, 444 S.E.2d 223 (N.C. 1994) (per curiam); *see also Huang v. Ziko*, 511 S.E.2d 305, 307 (N.C. Ct. App. 1999) (same, following *Clark*).

The authorities upon which Petitioner relies for her assertion that a case remains "pending" for purposes of 28 U.S.C. § 1367(d) throughout the entire federal appellate process do not, in fact, support that proposition. All are consistent with either the better view that a case ceases to be "pending" when it is dismissed by the federal district court, or the view that "pending" status ceases at the stage of discretionary appellate review. *See Okoro v. City of Oakland*, 48 Cal. Rptr. 3d 260, 264 (Cal. Ct. App. 2006) (adopting *Kendrick's* "well-reasoned" view that "a matter remains 'pending' in the federal court system, at least arguably through appeal to the courts of appeals afforded as a matter of statutory right") (quoting *Kendrick*, 98 Cal. Rptr. 2d at 157); *Berke v. Buckley Broad. Corp.*, 821 A.2d 118, 123 (N.J. Super. Ct. App. Div.) (holding that § 1367(d)'s tolling effect lasts until "thirty days following the judgment of the [district] court declining to exercise supplemental jurisdiction," and declining to decide whether case refiled within 30 days after federal appellate court's decision would have been timely), *cert. denied*, 832 A.2d 322 (N.J. 2003); *see also Harter v. Vernon*, 532 S.E.2d 836, 839 (N.C. Ct. App.) (not addressing periods beyond federal appeal as of right), *appeal dismissed and review denied*, 546

S.E.2d 97 (N.C. 2000), *cert. denied*, 532 U.S. 1022 (2001); *Estate of Fennell ex rel. Fennell v. Stephenson*, 528 S.E.2d 911, 914 (N.C. Ct. App. 2000) (same), *rev'd in part on other grounds*, 554 S.E.2d 629 (N.C. 2001); *Lucas v. Muro Pharms.*, 1994 WL 878820 at *1-*3 (Mass. Super. Ct. 1994) (same).

In this case, Respondent's federal appeal, including her petition for rehearing en banc by the Fourth Circuit, cannot serve to prolong the tolling period for her state claims under 28 U.S.C. § 1367(d), for several reasons. First, Respondent's state claims had been finally dismissed by the district court and her federal appeal concerned only her federal claims; for that reason alone, her state claims no longer were "pending" for purposes of 28 U.S.C. § 1367(d). Furthermore, even if Respondent's state claims were deemed to remain pending during the Fourth Circuit panel's proceeding on the federal claims, the state claims would have ceased to be "pending" for tolling purposes on the date when Respondent's appeal of right was decided, before Respondent sought further discretionary review by means of a petition for rehearing en banc. *See* Fed. R. App. P. 35(a), (f) (establishing discretionary nature of petition for en banc determination); *see also* Pet. for Writ of Cert. at 14.

The last date Respondent's state claims could have been "pending" was January 7, 2005, the date the Fourth Circuit panel affirmed the district court's judgment. *See* Fed. R. App. P. 40(a)(1) (requiring filing of petition for rehearing en banc "within 14 days after entry of judgment"); S. Ct. R. 13.3 ("The time to file a petition for a writ of certiorari runs from the date of

entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate . . . ."). Respondent did not refile her state claims in state court until March 11, 2005, approximately 36 months after the district court's dismissal of her state claims and 63 days after the Fourth Circuit's panel decision on the merits of her federal appeal. Accordingly, that refiling was untimely, under even the most liberal interpretation courts have afforded the term "pending" in § 1367(d).

Respondent relies in error upon two dictionary definitions of the word "pending," and certain legislative history of 28 U.S.C. § 1367(d). (*See* Br. in Opp'n at 10-13.) From those bare definitions, and from the drafters' removal of the words "in the district court" following "pending" in the final version of the statute, Respondent infers that, when enacting § 1367(d), Congress enlarged the meaning of "pending" in order to include any and all proceedings before federal appellate courts.

Respondent's inference is unwarranted, because "[i]nterpretation of a word or phrase depends upon reading the whole statutory text." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006). Section 1367(d) establishes a tolling rule for claims asserted under § 1367(a) that have been dismissed. Section 1367(a) concerns only the jurisdiction of the district courts. Thus, in every case, the dismissal of a claim triggering operation of § 1367(d) must be by a district court. Repeating that requirement in § 1367(d) would have been surplusage. Therefore, the drafters' removal

of the phrase "in the district court" from § 1367(d) merely eliminated surplus verbiage.

Respondent's final, policy-based argument for an expansive interpretation of "pending" in 28 U.S.C. § 1367 is similarly unpersuasive. Respondent argues that it is inefficient to require a plaintiff to refile her state claims in state court while federal appellate proceedings may be ongoing. (*See* Br. in Opp'n at 13-15.) However, there must come a point during prosecution of a federal action when the equities require a plaintiff's interest in preserving her state claims during the federal action to yield to the interests of defendants and the states themselves in timely resolution of those claims. The commentary to the United States Code Annotated addresses that balance, and defines that point, as follows:

> The dismissal moment should be taken to be the moment of dismissal in the district court. Even if an appeal is taken to a court of appeals from the district court dismissal, the party whose claim has been dismissed under § 1367 does best to commence the state action within the prescribed time measured from the district court dismissal, and not from some later appellate affirmance of it. Perhaps, after commencing the state court action in such a situation, the plaintiff can ask the state court to stay the action – now timely commenced and pending – while the federal appeal proceeds.

(App. 50). Petitioner's disagreement with this recommended approach only highlights the need for a definitive federal ruling.

B. This Case Is a Suitable Vehicle for Determining the Meaning of "Tolled" in 28 U.S.C. § 1367(d).

For the reasons just stated, it is highly likely that, in deciding this case, this Court would resolve the correct interpretation of both "pending" and "tolled," as those terms are used in 28 U.S.C. § 1367(d). Significantly, although the intermediate and highest Maryland appellate courts issued opposite judgments in this case, both of those courts deemed it necessary to decide both statutory questions. (App. 10-30, 39-51.) There is no reason to think that the Maryland courts reached out to decide any issue unnecessarily, as it is not their general practice to do so. *See, e.g., Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 55 (2008) ("[W]e decline Petitioner's invitation to address the issue of standing where unnecessary to do so in order to decide the outcome of the case."); *see also Sydnor v. State*, 365 Md. 205, 222 (2001) (Raker, J., concurring in result) (referencing "the well-known tenet that appellate courts should not decide issues unnecessarily").

Respondent advocates a construction of the term "tolled" in 28 U.S.C. § 1367(d) that is contrary to reason and the canons of statutory construction, contrary to the statute's legislative history and purpose, and also contrary to principles of federalism. (*See* Pet. for Writ of Cert. at 16-22; Br. of N.C., et al. as *Amici Curiae* in Support of Pet'rs. at 8-13; *see also*

App. 37-51.) Respondent's refiling of her state claims in state court could be considered timely only if "tolled" in § 1367(d) meant "suspended," such that the state limitations period ceased to run altogether, from the filing of her federal suit on May 15, 2001 through the denial of reconsideration en banc by the Fourth Circuit on March 8, 2005. As shown in the petition (at 10-13), that reading of "tolled" embraces the minority view among the sharply divided state courts, and has been rejected by every federal appellate court that has considered the question. This Court should grant the petition in this case to interpret "tolling" definitively.

C. There Is No Superior Vehicle For Deciding The Important Questions This Case Presents.

Respondent recommends that this Court forego the present opportunity to provide guidance on the meaning of both "pending" and "tolled" in 28 U.S.C. § 1367(d), because "surely a case cleanly presenting" the issue of what "tolled" means "will soon come before this Court." (Br. in Opp'n at 16). Respondent names, in particular, *Goodman v. Best Buy, Inc.*, 755 N.W.2d 354 (Minn. Ct. App. 2008), as a candidate for this Court's consideration. The Supreme Court of Minnesota, before which *Goodman* currently is pending, has stayed that case pending the outcome of the petition for a writ of certiorari in this case. (App., *infra*, at 1-2.) Whereas Respondent argues that this Court should await resolution of *Goodman*, *Goodman* itself awaits resolution of the present case.

If this Court were to deny certiorari in the present case, there is no certainty that *Goodman* ever would

reach this Court, or, even if it did, that it would present a better vehicle for interpreting 28 U.S.C. § 1367(d). The parties in *Goodman* may settle their dispute before the Supreme Court of Minnesota decides it. Even if the Supreme Court of Minnesota ultimately does decide the case, there is nothing to prevent that Court from resting its decision upon the independent question of state common law that the case also poses. (*See* 2007 WL 5581628 (*Goodman* Appellant's Br. & App.); 2007 WL 5581629 (*Goodman* Br. of Respondent); 2007 WL 5581630 (*Goodman* Appellant's Reply Br. & App.).) Furthermore, even if the Supreme Court of Minnesota were to decide *Goodman* upon the basis of § 1367(d), the decision likely would address the meaning only of "tolled," not "pending" (*see id.*; *see also* Br. in Opp'n at 16).

Respondent's argument that the Court "surely" will see other petitions involving § 1367(d), even if it were to prove correct, only highlights that the questions presented in this petition are recurring. This case offers a timely and suitable vehicle for resolving the split of authority on the proper application of 28 U.S.C. § 1367(d). Their timely resolution is a matter of considerable importance to the states, as evidenced by the participation of 18 states as amici in support of the petition in this case. Accordingly, this Court should avail itself of the opportunity this case presents to issue definitive guidance on the interpretation of § 1367(d) in its entirety.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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App. 1

STATE OF MINNESOTA

IN SUPREME COURT

A07-1820

Jonathon L. Goodman,

Respondent,

vs.

Best Buy, Inc.,

Appellant.

ORDER

Respondent Jonathon L. Goodman has filed a motion to stay proceedings in the above-entitled case pending the United States Supreme Court's resolution of a petition for a writ of certiorari in *Turner v. Kight*, 957 A.2d 984 (Md. 2008), *petition for cert. filed*, 77 U.S.L.W. 3412 (U.S. Jan. 5, 2009) (No. 08-849). Appellant Best Buy, Inc., does not oppose respondent's motion. On January 15, 2009, this court ordered the briefing deadlines in this case stayed pending a decision on respondent's motion.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that all proceedings in this court be, and the same are, stayed pending a decision by the Supreme Court on the petition for a

writ of certiorari in *Kight v. Turner,* No. 08-849 (U.S.). Respondent shall notify the court and counsel for appellant and amici curiae of the decision by The Supreme Court on the petition for a writ of certiorari within 10 days of the decision.

Dated: February 4, 2009

BY THE COURT:

/s/
Eric J. Magnuson
Chief Justice

PAGE, J., took no part in the consideration or decision of this matter.

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No. 08-849

Supreme Court, U.S.
FILED
FEB 6 - 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

RAYMOND A. KIGHT, ET AL.,
Petitioners,

v.

SHERRI A. TURNER,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF NORTH CAROLINA, ALASKA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, KENTUCKY, MASSACHUSETTS, MISSISSIPPI, NEVADA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When a federal district court dismisses state law claims under 28 U.S.C. § 1367(c) and the state limitations period has expired, is the time period under 28 U.S.C. § 1367(d) for re-filing such claims in state court limited to 30 days?

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INTEREST OF AMICI[1]

The tolling provision of 28 U.S.C. § 1367(d) directly impacts States and state court systems. The statute mandates that state courts hear and adjudicate state law claims which the States would otherwise reject as stale under the state limitations period. The statute therefore raises significant federalism concerns and should be construed so as to minimize the impact on the state court systems.

State courts face substantial dockets. When stale claims are allowed to proceed, the burdens on the state courts are increased substantially. The value and utility of trial testimony greatly diminishes when the memories of witnesses have faded as a result of delay. In such cases, the recollection of the witnesses must be refreshed through documents or deposition transcripts. Other witnesses become unavailable entirely. Simple cases become more complex as documents and records must be introduced to fill-in gaps in the witnesses' narratives – all because the witness is no longer able to recall clearly dates and specific facts. Cases that were once straight-forward become murky with the passage of time. As a result, juries and trial judges must spend more time and resources in attempting to come to a fair result. Moreover, confidence in the judicial system is lost when delay can be used to obtain a strategic advantage. All of these factors further tax already strained state court systems. Accordingly, States have a substantial interest in ensuring that 28

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[1] As required by Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *amici curiae's* intention to file this brief at least ten days prior to the due date for this brief.

U.S.C. § 1367(d) not be construed in a manner that undermines the policy choices made by state legislatures with respect to state limitations periods.

Finally, the States have a substantial interest in the decision below in light of the financial impact on States and their political subdivisions. Here, the court below allowed an action to proceed against eleven state and county law enforcement officers that would otherwise have been barred under the applicable Maryland limitations period. Such a construction of 28 U.S.C. § 1367(d) requires States to expend substantial resources to defend stale claims and subjects the State's political subdivisions to liability – even though the claim would be barred under state law.[2]

REASONS FOR GRANTING THE PETITION

Numerous state courts of last resort have split as to how 28 U.S.C. § 1367(d) should be interpreted. (Pet. at 10-11) Many state courts have found the language of this statute to be ambiguous. As a result, state courts have been forced to guess as to the intent of the United States Congress.

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[2] Maryland law, like that of a substantial number of other States, provides that the State Attorney General shall defend certain claims brought against county sheriffs and deputies. *See* MD. CODE ANN., State Gov't §§ 12-101(a)(6), 12-108(b) (2004 & Supp. 2008).

The issue raised by this petition is important to States, their political subdivisions, and both plaintiffs and defendants in actions brought pursuant to 28 U.S.C. § 1367. This Court should grant certiorari to ensure uniformity on this important and recurring question and to reverse the erroneous ruling of the Maryland Court of Appeals.[3]

I. THE AMBIGUITY CREATED BY CONGRESS PLACES A DIFFICULT BURDEN ON STATES, THEREBY MERITING INTERVENTION BY THIS COURT.

Numerous courts have found the language of 28 U.S.C. § 1367(d) to be ambiguous. *See, e.g., Turner v. Kight,* 957 A.2d 984, 989 (Md. 2008); *Berke v. Buckley Broad. Corp.*, 821 A.2d 118, 123 (N.J. Super. Ct. App. Div.), *certification denied*, 832 A.2d 322 (N.J. 2003); *see also Goodman v. Best Buy, Inc.,* 755 N.W.2d 354, 357 (Minn. Ct. App.) (listing different potential meanings of the phrase "shall be tolled"), *review granted,* 2008 Minn. LEXIS 643 (Minn. 2008). The statute provides:

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[3] This amicus brief focuses exclusively on the first question presented by the petition. The States, however, concur with Maryland that the second issue raised by the petition (i.e., whether a federal action is "pending" within the meaning of 28 U.S.C. § 1367(d) when the plaintiff has appealed a dismissal of the action) has also been problematic for state courts. (Pet. at 13-14)

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d) (2006). On the one hand, the phrase "shall be tolled while the claim is pending" can be read as meaning that the filing of the federal action suspends the limitations clock. Under such a reading, when the federal action is dismissed and the clock is restarted, the plaintiff would get the benefit of whatever time remained when the limitations period was suspended. On the other hand, the phrase has been construed by the vast majority of courts as meaning that while the federal action is pending, the limitations period will not expire and will not close until 30 days after the federal action is dismissed. *See* Pet. at 10-11 (setting out split of authority). Under such a reading, the plaintiff would need to re-file in state court within 30 days of the dismissal of the federal action (unless the limitations period had not yet expired under state law).

The burden and uncertainty created by Congress' poor draftsmanship falls almost exclusively on state courts and litigants appearing in state courts. Because this federal statute dictates when an action may be re-filed in state court, the issue of whether an action has been re-filed in accordance with the time limits of 28 U.S.C. § 1367(d) only arises in state court. Although

federal courts have cited 28 U.S.C. § 1367(d) in passing when dismissing actions, whether an action has been re-filed within the time period contemplated by 28 U.S.C. § 1367(d) can only be determined after the action has been re-filed. By definition, the re-filing of such claims always occurs in state court. Congress has left in the laps of States a poorly worded statute that directly impacts state law claims brought in state court. State legislatures, however, have no opportunity to correct the uncertainty that Congress has created.

The problem that Congress has caused for state courts can only be resolved by this Court. The circuit courts will never have occasion to pass upon whether an action was timely re-filed in state court under 28 U.S.C. § 1367(d). Accordingly, the substantial split among the state courts of last resort merits intervention by this Court. The state courts have struggled in their efforts to discern congressional intent. A definitive resolution of this important issue is vitally needed.

II. THE DECISION BELOW RAISES AN IMPORTANT ISSUE OF FEDERAL LAW.

The issue presented by the petition is whether 28 U.S.C. § 1367(d) was intended to force state courts to hear stale claims long after the 30-day period set out in the statute has passed. The decision below has broad implications on principles of federalism. Moreover, the proper interpretation of 28 U.S.C. § 1367(d) affects the administration of our Nation's state

courts and directly impacts litigants appearing in those courts.

When Congress commandeers the legislative processes of the States by directly compelling the expenditure of scarce state resources in order to achieve Congress' objectives, principles of federalism are implicated. *See New York v. United States*, 505 U.S. 144, 161 (1992). Under 28 U.S.C. § 1367(d), state court judges are required to hear and adjudicate state law claims that the state legislature has determined to be time barred. When the state court system becomes bogged down with adjudicating such stale claims, no government official stands accountable for the problem. *See New York*, 505 U.S. at 169. Neither state legislatures nor state officials have authority to override the federal tolling period, and Congress is too far removed from the administration of state courts to incur the wrath of citizens when the burden created by Congress strains the state court system and renders it less effective. Accordingly, government accountability is diminished because "elected state officials cannot regulate in accordance with the views of the local electorate." *Id.* To the extent that 28 U.S.C. § 1367(d) is construed as imposing a tolling period greater than is necessary to achieve Congress' objective (i.e., facilitating the prompt transfer of state law claims from federal to state court when all federal law claims are resolved), state sovereignty is jeopardized. *See Raygor v. Regents Univ. of Mich.*, 534 U.S. 533, 546 (2002) ("insofar as statutory intent was ambiguous, we would 'not attribute to Congress an intent to intrude on state governmental functions'") (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)).

Forcing state courts to hear stale claims places a substantial burden on the States. Moreover, the very integrity of the court system is undermined if a party may bring suit despite having slumbered on his claims "until evidence has been lost, memories have faded, and witnesses have disappeared." *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944).

Statutes of limitations "represent a legislative judgment about the balance of equities." *United States v. Marion*, 404 U.S. 307, 323 n.14 (1971); *see also Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"). State legislatures must balance the integrity and efficiency of the court system, as well as the rights of defendants, against the potential that a meritorious claim will be barred. The interpretation of 28 U.S.C. § 1367(d) adopted by the Maryland Court of Appeals effectively supersedes such public policy determinations. The impact of setting aside the balance struck by these state legislatures is substantial. The resolution of the issue raised by the petition is vitally important to the proper administration of the court systems of all States.

III. THE COURT BELOW ERRED IN ADOPTING A CONSTRUCTION OF 28 U.S.C. § 1367(d) THAT WOULD FORCE STATES TO ACCEPT STALE CLAIMS.

Not only does the petition present the Court with an opportunity to resolve the split among the state courts of last resort with respect to this important issue, the Court should grant certiorari to correct the erroneous decision of the Maryland Court of Appeals. The decision below is inconsistent with both the language of the statute and congressional intent.

The statute provides that when federal jurisdiction to hear an action is based solely on 28 U.S.C. § 1331 and state law claims are dismissed pursuant to 28 U.S.C. § 1367(c), the state limitations period for state law claims "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed." 28 U.S.C. § 1367(d). The statute should therefore be read as affording plaintiffs a 30-day period to re-file state law claims after the federal action is dismissed. While the federal action is pending, the state limitations period "shall be tolled" (i.e., the pendency of the federal action keeps the state limitations period from expiring). Once the federal action is dismissed, the plaintiff has "a period of 30 days" within which to re-file those state law claims. 28 U.S.C. § 1367(d).

Under the interpretation adopted by the Maryland Court of Appeals, the state law limitations period is tolled not once, but twice. Under the decision below, the filing of the federal action prevents the state limitations period from expiring, and the portion

of the limitations period that remained when the federal action was commenced is added to the 30-day period. As a result of this double counting of the tolling period, the original state limitations period can become twice as long. Take, for example, a State that has adopted a three-year limitations period for state antitrust violations. If the plaintiff files a federal court action shortly after the violation and the federal claims are dismissed after approximately three years, the plaintiff, under the decision below, would effectively have a new three year limitations period. Allowing such a claim to be brought in state court six years after the date of the violation and three years after the federal court dismissal cannot be squared with the language of the statute.

Congressional intent further confirms that the decision below is wrong. The Judicial Improvements Act of 1990, 104 Stat. 5089 (1990), was enacted to address what Congress perceived to be a growing burden on the Nation's economy as a result of high litigation costs. S. Rep. No. 101-416, at 7 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6809. This statute must be construed in light of that purpose. *See, e.g., Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). Congress would not have responded to "[t]he burden of high litigation costs" by substantially expanding state limitations periods, thereby compounding the very problem Congress sought to remedy. S. Rep. No. 101-416, at 7 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6809.

Prior to 1990, an appropriate mechanism did not exist for the efficient transfer of pendent state claims from federal court to state court when the federal

claims were dismissed. Prior to the adoption of 28 U.S.C. § 1367(d), if the state statute of limitations expired while the action was pending in federal court, the federal court had no means of ensuring that the state law claims could be re-filed in state court without the risk that those claims would be dismissed as time barred. *See Jinks v. Richland County,* 538 U.S. 456, 462-63 (2003). In 1990, Congress amended the statute in order to "provid[e] a straightforward tolling rule" that would facilitate the transfer of remaining state law claims to state court after the federal claims are dismissed. *Id.* at 463; *see* Judicial Improvements Act of 1990, 104 Stat. 5089 (1990).

The tolling provision set out in 28 U.S.C. § 1367(d) was added "to prevent the loss of claims to statutes of limitations . . . while a supplemental claim was pending in federal court." H.R. Rep. No. 101-734, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6876. Congress intended to provide a limited window so that state law claims could be re-filed in state court without the risk that those claims would be time barred under state law. The statutory language and its legislative history is devoid of any indication that Congress intended to significantly expand the time within which state law claims may be brought in state court. When Congress intends to dramatically alter the delicate balance between the States and the Federal Government, Congress "must make its intention to do so "'unmistakably clear in the language of the statute.'" *Raygor v. Regents Univ. of Mich.,* 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985))). Here, no such unmistakable intent can be

found in either the statutory language or the legislative history.

28 U.S.C. § 1367(d) was patterned after a 1969 proposal of the American Law Institute ("ALI"). Ralph U. Whitten, *Commentary: Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259, 283 n.79 (2001); Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction under 28 U.S.C. § 1367(d)*, 78 MARQ. L. REV. 973, 1031 n.306 (1995). This ALI proposal advocated a 30-day period to re-file claims that were dismissed by a federal court for lack of subject matter jurisdiction. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 65 (1969). The commentary to the ALI proposal states:

> This subsection provides that if an action timely commenced in a federal court is dismissed for lack of [subject-matter] jurisdiction, a new action on the same claim in another court shall not be barred by any statute of limitations that would not have barred the original action had it been commenced in that court, if suit is brought in a proper court, state or federal, within thirty days or within such longer period as may be available under applicable state law.

Id. at 373-74 (emphasis added). Just as the ALI proposal set out a straightforward 30-day period, the drafters of 28 U.S.C. § 1367(d) universally understood this statute as creating a 30-day period to re-file in

state court. *See* Thomas M. Mengler, Stephen B. Burbank, Thomas D. Rowe, Jr., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 216 (1991) (noting that when claims are dismissed under 28 U.S.C. § 1367(c), such claims "are tolled for 30 days after they are dismissed, unless state law provides for a longer period"); H.R. Rep. No. 101-734, at 27 n.13 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6873 n.13 (expressing appreciation to Mengler, Burbank and Rowe for their role in the drafting of this section); *see also* David D. Siegel, *The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction,* 28 U.S.C.A. § 1367, at 768 (West 2006) (commentary on revision) (referring to "the 30-day tolling provision of subdivision (d)").

A 30-day period to re-file state claims is entirely consistent with Congress' intent to provide an appropriate mechanism to allow the transfer of claims from federal to state courts. The tolling provision of 28 U.S.C. § 1367(d) only applies following dismissal of a federal action – an act that occurs after the plaintiff has completed his pre-complaint investigation and has drafted and filed his complaint. Following the dismissal of the federal action, plaintiff's counsel need merely amend the caption of the complaint, repeat the state law claims set out in the federal complaint and file the action in state court. Such a ministerial task can be accomplished readily in far less than 30 days. The Maryland Court of Appeals, however, concluded that Congress intended to expand substantially the plaintiff's time period for re-filing – affording plaintiff a two year re-filing period under the facts of this case. Such a result is not consistent with Congress' desire to

create a limited window within which the state law claims can be re-commenced in state court. The decision of the Maryland Court of Appeals is in error and should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

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February 2009

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